

United States  
Court of Appeals  
for the Ninth Circuit

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UNION PACIFIC RAILROAD COMPANY, a  
Corporation, Appellant,  
vs.

LaVERL JOHNSON and JOLEEN JOHNSON,  
Husband and Wife, and PACIFIC FRUIT  
EXPRESS COMPANY, a Corporation,  
Appellees.

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Transcript of Record

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Appeal from the United States District Court for the  
District of Idaho, Eastern Division

FILED

DEC 6 1954



No. 14498

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Court of Appeals  
for the Ninth Circuit

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

BRYAN P. LEVERICH,  
10 South Main Street,  
Salt Lake City, Utah,

L. H. ANDERSON,

E. C. PHOENIX,  
P.O. Box 530,  
Pocatello, Idaho,

Attorneys for Appellant.

B. W. DAVIS,  
Box 1049,

GEORGE R. PHILLIPS,  
Box 784,

LOUIS F. RACINE, JR.,  
Box 1243,  
Pocatello, Idaho,

Attorneys for Appellees, LaVerl Johnson  
and Joleen Johnson.

MILTON E. ZENER,  
BEN PETERSON,  
Carlson Building,  
Pocatello, Idaho,

Attorneys for Appellee, Pacific Fruit  
Express Company.



In the District Court of the United States in and  
for the District of Idaho, Eastern Division

No. 1775

LA VERL JOHNSON and JOLEEN JOHNSON,  
husband and wife, Plaintiffs,  
vs.

UNION PACIFIC RAILROAD COMPANY, a  
corporation, Defendant.

## COMPLAINT

Plaintiffs complain of the defendant and allege:

### I.

That the plaintiffs are residents of the State of Idaho and the defendant is a corporation of the State of Utah; that the matter in controversy exceeds, exclusive of all interest and costs, the sum of \$3,000.00.

### II.

That at all times herein mentioned the defendant was the owner of and operating a railroad through the City of Pocatello, County of Bannock, State of Idaho, hauling for hire passengers, freight and United States mail from and to different points upon its line of railroad in the State of Idaho.

### III.

That on or about November 4, 1950, at or about the hour of 2:30 o'clock p.m. of said day, plaintiff, La Verl Johnson received injuries hereinafter de-

scribed by reason of the negligence, carelessness and disregard of his rights by the defendant in the furnishing of electrical energy and in the operation of an electrical substation located in the City of Pocatello, County of Bannock, State of Idaho.

#### IV.

By reason of the negligence, carelessness and disregard of his rights by the defendant, plaintiff, La Verl Johnson, was so burned and maimed by electrical energy as to require the amputation of both of his legs at the knee and as to require the amputation of his right arm at the shoulder socket; that said plaintiff was otherwise injured by the extreme shock to his entire nervous system resulting from said electrical energy and the amputations.

#### V.

That said plaintiff was hospitalized from immediately following the injury until on or about the 1st day of March, 1951; that he was under constant medical treatment and care during said period and was required to have large and frequent dosages of drugs; that from on or about March 1, 1951, until on or about October 1, 1952, said plaintiff continued under medical care and treatment at his home in Pocatello, Idaho; that until the late summer of 1951, said plaintiff was given continued and frequent dosages of drugs to alleviate his pain and suffering.

#### VI.

That from the date of said injuries, November

4, 1950, until on or about the 1st day of July, 1951, said plaintiff was under a legal disability, was incompetent, wholly unable to understand the nature or effect of his acts and to manage his affairs.

## VII.

That at the time of said injuries, the plaintiff, La Verl Johnson, was in the employ of the Pacific Fruit Express Company in Pocatello, Idaho; that following the accident and during the month of December, 1950, the defendant, through its duly authorized claim agents represented to the plaintiffs that the plaintiff, La Verl Johnson, was entitled to a settlement under the Workmen's Compensation Laws of the State of Idaho and that in addition thereto another settlement would be made by the defendant herein and that plaintiffs had three years in which to file a claim for damages if dissatisfied and that if any considerations concerning the accident other than compensation payments should arise that plaintiffs should contact the Union Pacific Railroad Company Claim Agent.

## VIII.

That, likewise, the defendant from time to time through October of 1952, by and through its claim agents, duly authorized, represented to plaintiffs that no other and additional settlement to that of Workmen's Compensation could be made until plaintiff, La Verl Johnson, had a surgical healing of his amputated legs and arm. That on or about July 10, 1951, the defendant through its authorized

claim agents, and for the purpose of inducing the plaintiff to execute a compensation agreement with the Pacific Fruit Express Company represented that an additional settlement by the defendant would be made upon the surgical healing of the legs and arm of plaintiff, La Verl Johnson.

## IX.

That following the surgical healing of plaintiff, La Verl Johnson's legs and arm on or about the last day of October, 1952, the plaintiffs not hearing from the claim agent of the defendant within a reasonable time thereafter with reference to the additional settlement promised, as heretofore alleged, that plaintiffs should receive, attempted to learn what settlement was to be made; that plaintiffs were then informed no settlement would be made by the Union Pacific Railroad Company. Plaintiffs further allege that they are now advised the defendant will plead the statute of limitations of the State of Idaho as a bar to the action of plaintiffs.

## X.

Plaintiffs allege they were lulled into a false sense of security by the promises, representations, and the assurances of the defendant, as aforesaid; that plaintiffs relied upon such representations and assurances and forebore to sue, and that now to permit the defendant to deny liability solely on the ground that plaintiffs' action was not instituted within the two years statute of limitations of the

State of Idaho would operate as a fraud upon plaintiffs.

### XI.

Plaintiffs allege further that the herein recited conduct of the defendant, by its authorized claim agents, obstructed the investigation and prosecution of plaintiffs' action against the defendant and that the time that such obstruction continued can not be computed as any part of the time within which plaintiffs right of action was required to be instituted.

### XII.

Plaintiffs further allege that in accordance with the allegations contained in Paragraph VIII hereof, plaintiff, La Verl Johnson, was incompetent and under a legal disability and that the time of such disability, to wit, between the date of said accident until on or about the 1st day of July, 1951, does not form a part of the time limit for the commencement of this action against defendant.

### XIII.

That at the date of the accident plaintiff, La Verl Johnson, was an able bodied man of the age of 23 years earning approximately \$300.00 per month; that by reason of the acts of the defendant, plaintiff, La Verl Johnson, has suffered permanent and lasting injuries and a total loss of income, all to plaintiffs' damage in the sum of \$300,000.00.

Wherefore, plaintiffs pray damages in the sum of

\$300,000.00, all costs of suit, and such other additional relief as to the Court appears proper.

/s/ B. W. DAVIS, by GRP,  
/s/ GEORGE R. PHILLIPS,  
/s/ LOUIS F. RACINE, JR., by GRP

Plaintiffs hereby request a trial by jury.

[Endorsed]: Filed March 20, 1953.

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[Title of District Court and Cause.]

### SUMMONS

To the Above Named Defendant:

You are hereby summoned and required to serve upon plaintiffs' attorneys, whose addresses are Pocatello, Idaho, an answer to the complaint which is herewith served upon you, within twenty days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Dated: March 20, 1953.

[Seal]      /s/ ED. M. BRYAN,  
                 Clerk of the Court  
         /s/ By LONA MAUSER,  
         Deputy

Marshal's Return on Service of Writ attached.

[Endorsed]: Filed April 2, 1953.

[Title of District Court and Cause.]

MINUTE ORDER OF MAY 11, 1953

Comes now L. H. Anderson, counsel for the defendant and B. W. Davis, counsel for the plaintiff.

The defendant, through its said counsel, withdrew the Motion to Dismiss the Complaint. There being no objections, the defendant was given 60 days to answer.

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[Title of District Court and Cause.]

MINUTE ENTRY OF MAY 18, 1953

This cause came on regularly this date in open Court on objections to plaintiff's interrogatories; B. W. Davis, George B. Phillips, and L. F. Racine appearing on behalf of the plaintiff, and L. H. Anderson appearing for the defendant. After hearing counsel, the plaintiff was ordered to answer interrogatory No. 1, and the objection was sustained as to the remainder of the interrogatories.

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[Title of District Court and Cause.]

ANSWER

Comes now the defendant and answering plaintiffs' complaint filed herein, admits, denies and alleges as follows:

First Defense

I.

Admits the allegations of paragraphs I and II.

## II.

Denies the allegations of paragraphs VI, VIII, IX, X, XI and XII.

## III.

Answering paragraph III, admits that on or about November 4, 1950, at approximately 2:30 p.m., of said day, LaVerl Johnson was injured in the City of Pocatello, Bannock County, Idaho; and denies each and every other allegation in said paragraph III.

## IV.

Answering paragraph IV, admits that LaVerl Johnson was so injured by electrical energy as to require the amputation of his legs six inches below the knees, and the amputation of his right arm three inches below the head of the humerus, and denies each and every other allegation in said paragraph.

## V.

Answering paragraph V, admits that immediately following his injuries LaVerl Johnson was hospitalized and that he then and for some time thereafter received medical and surgical treatment; alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of each and every other allegation in said paragraph V.

## VI.

Answering paragraph VII, admits that LaVerl Johnson was in the employ of the Pacific Fruit Express Company, a corporation; denies each and every other allegation in said paragraph VII; al-

leges that the said LaVerl Johnson received his injuries in the course of his employment solely with the Pacific Fruit Express Company, a corporation.

### VIII.

Answering paragraph XIII, alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that at the date of the accident LaVerl Johnson was an able bodied man of the age of twenty-three years, earning approximately \$300.00 per month, or the amount of his earnings per month in whatever amount; denies that by reason of any acts of this defendant LaVerl Johnson has suffered permanent and/or lasting injuries, and/or a total loss of income to plaintiffs' damage in the sum of \$300,000.00, or in any sum of money whatsoever.

### Second Defense

The right of action set forth in the complaint did not accrue within two years next before the commencement of this action and the claim is therefore barred by the provisions of Subdivision 4 of Section 5-219 Idaho Code.

### Third Defense

Any injuries sustained or suffered by the plaintiff LaVerl Johnson at the time and place and on the occasion mentioned in the complaint were caused in whole or in part, or were contributed to, by the negligence or fault or want of care of the said LaVerl Johnson, and not by any negligence

or fault or want of care on the part of this defendant.

#### Fourth Defense

The work in which LaVerl Johnson was engaged at the time and place of the occurrence complained of in plaintiffs' complaint had certain risks incident thereto, which were obvious and well known to LaVerl Johnson at all the times he was engaged in said work and also when he first entered thereon, and those risks were assumed by him, and whatever injuries and illnesses he received in doing the said work and which are complained of by the plaintiffs herein, arose from and were caused by those risks thus assumed by him.

Wherefore, this defendant prays that the plaintiffs take nothing by reason of their complaint and that it go hence without day and with its costs.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. H. CASTERLIN,

/s/ E. C. PHOENIX,

Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed July 10, 1953.

[Title of District Court and Cause.]

### MINUTE ENTRY OF NOV. 9, 1953

This cause came regularly on this date in open court for hearing on plaintiffs' objections to interrogatories, plaintiffs' motion to produce, and motion of the Pacific Fruit Express Company to intervene as plaintiff.

After hearing respective counsel, the motion to produce was overruled; the motion for intervention was granted for the purpose of the Pacific Fruit Express Company to file a claim in and for any apportionment for an award that may be obtained. It was ordered that any information not now covered by the Court's order of September 2, 1953 be furnished within the next few days.

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[Title of District Court and Cause.]

### MINUTE ENTRY OF NOV. 18, 1953

This cause came on for trial before the Court and a jury, Messrs. Louis F. Racine, Jr. and George R. Phillips appearing as counsel for plaintiffs, and Messrs. L. H. Anderson and E. H. Casterlin appearing for the defendant.

Upon motion of L. F. Racine, Jr., one of counsel for plaintiffs, it was ordered that the complaint be amended at paragraph 6, page 2 to read November 4, 1950 instead of March 5, 1950.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper, to secure a jury. Mabel Hartley and Lydia Bybee, whose names were so drawn, were excused for cause; Mrs. O. W. Peterson and Mary E. Randall, whose names were also drawn, were excused on the plaintiffs' peremptory challenge; and Hazel Peterson, whose name was likewise drawn, was excused on the defendant's peremptory challenge.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified and who were accepted by the parties to complete the panel of the jury, to-wit:

Wayne E. Bird, Max Bartschi, Roy E. Taylor, Fred S. Haines, Orvin Wennergren, Boyd Keele, Willis W. Williams, Bert E. Taylor, Mrs. Jack Sauer, Ida Christensen, Lorin Ashliman, D. C. Buxton.

The Court directed that two jurors, in addition to the panel, be called to sit as alternate jurors. Thereupon, the names of George Hancock and Donna Heilesen were drawn from the jury box, and on being sworn and examined on voir dire, were found duly qualified, and were accepted by counsel for the respective parties.

The jury panel and the alternate jurors were sworn to well and truly try the cause at issue and a true verdict render.

After a statement of plaintiffs' cause by counsel, Mrs. Joleen Johnson was sworn and examined as a witness on the part of plaintiffs, and other evidence was introduced.

After admonishing the jury, the Court excused them to 10 o'clock a.m., Thursday, November 19th, and continued the trial to that time.

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[Title of District Court and Cause.]

#### MINUTE ENTRY OF NOV. 19, 1953

This cause came on for further trial before the Court and jury, counsel for the respective parties being present, it was agreed that the jury panel and the alternate jurors were all present.

Mrs. Joleen Johnson was recalled and further examined, Patricia E. Brown, Dow B. Peterson, Mrs. Vesta Johnson, Nola Murphy, R. K. Hart, Violet Rae Waldron, H. P. Stearm and LaVerl A. Johnson were called and further examined, as witnesses on the part of the plaintiff, and documentary evidence was introduced.

The depositions of LaVerl Johnson and Joleen Johnson was published upon order of the Court.

After admonishing the jurors, the Court excused them to 10 o'clock a.m., Friday, November 20, 1953, and continued the trial to that time.

[Title of District Court and Cause.]

MINUTE ENTRY OF NOV. 20, 1953

This cause came on for further trial before the Court and jury, counsel for the respective parties being present, it was agreed that the jury panel and the alternate jurors were all present.

Comes now E. H. Casterlin, one of counsel for the defendant, and moves the Court for an order striking defendant's second defense of the Answer and striking Exhibits 1 to 12 inclusive. The Court being advised in the premises, ordered the second defense of the Answer stricken and all exhibits stricken except the hospital records of the plaintiff, being Nos. 9 to 12 inclusive.

Irving J. Eskelson was sworn and examined as a witness on the part of the plaintiff.

After admonishing the jurors, the Court excused them to 10 o'clock a.m., Monday, November 23, 1953, and continued the trial to that time.



[Title of District Court and Cause.]

MINUTE ENTRY OF NOV. 23, 1953

This cause came on for further trial before the Court and jury, counsel for the respective parties being present, it was agreed that the jury panel and the alternate jurors were all present.

Tony Tofenelli, Milio Tofenelli, Guy McClellan, Milton T. Sargent, David John Nelson, Earl R.

Gilbert, Harold W. Rising, Elmer V. Smith and Harold A. Shoup were sworn and examined and LaVerl Johnson was recalled and further examined on the part of the plaintiffs, and other evidence was introduced.

After admonishing the jurors, the Court excused them to 10 o'clock a.m., Tuesday, November 24, 1953, and continued the trial to that time.

---

[Title of District Court and Cause.]

#### MINUTE ENTRY OF NOV. 24, 1953

This cause came on for further trial before the Court and jury, counsel for the respective parties being present, it was agreed that the jury panel and the alternate jurors were all present.

At this time the Court ordered that plaintiffs' exhibits Nos. 1 to 8 inclusive be and the same hereby are, stricken and withdrawn from the record.

Here the plaintiff rests.

After a statement of defendant's cause by counsel, Earl R. Gilbert, Harold R. Arter, Harry C. Meyer, Hubert Brennan, Harold A. Shoup, J. E. Johnson, Melvin Judge and Alvin C. Taylor were sworn and examined as witnesses on the part of the defendant, and other evidence was introduced.

After admonishing the jury, the Court excused them, and continued the trial of this case to 10 o'clock a.m., Wednesday, November 25, 1953.

[Title of District Court and Cause.]

### MINUTE ENTRY OF NOV. 25, 1953

This cause came on for further trial before the Court and jury, counsel for the respective parties being present, it was agreed that the jury panel and the alternate jurors were all present.

Hubert Brennan was recalled and further examined as a witness on the part of the defendant, and here the defendant rests and both sides close.

Both sides having closed, comes now the defendant and moves the Court to instruct the jury to return a verdict for the defendant and against the plaintiff. The motion was by the Court denied.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury.

The Court discharged the alternate jurors, and the jury panel retired in charge of bailiffs, duly sworn, to consider of their verdict. While the jury was still out, the Marshal was directed to provide them with supper at the expense of the United States.

On the same day the jury returned into court, counsel for the respective parties being present, whereupon the jury presented their written verdict, which was in the words following:

[Title of Court and Cause.]

#### Verdict

"We, the jury in the above entitled cause, find for the plaintiffs, and against the defendant, and

assess damages against the defendant in the sum of \$225,000.00.

Owan Wennergren, Foreman.”

The verdict was recorded in the presence of the jury and then read to them and they each confirmed the same.

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[Title of District Court and Cause.]

### VERDICT

We, the jury in the above entitled cause, find for the plaintiffs, and against the defendant, and assess damages against the defendant in the sum of \$225,000.00.

/s/ OWAN WENNERGREN,  
Foreman

[Endorsed]: Filed November 25, 1953.

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In the United States Court for the District of  
Idaho, Eastern Division

No. 1775

LA VERL JOHNSON and JOLEEN JOHNSON,  
husband and wife, Plaintiffs,  
vs.

UNION PACIFIC RAILROAD COMPANY, a  
corporation, Defendant.

### JUDGMENT

This cause came on for trial before the Court and a jury, both parties appearing by counsel, and

the issues having been duly tried and the jury having rendered a verdict for plaintiffs in the sum of \$225,000.00,

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs recover of defendant the sum of \$225,000.00 with interest at the rate of 6% per annum, and their costs of action, and that plaintiffs have execution therefor.

Witness The Honorable Chase A. Clark, Judge of said court, and the seal thereof, this 25th day of November, 1953.

[Seal]            /s/ ED. M. BRYAN,  
Clerk

[Endorsed]: Filed November 25, 1953.

---

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITH-  
STANDING THE VERDICT AND MOTION  
FOR NEW TRIAL

Comes now the Union Pacific Railroad Company, a corporation, and moves the court to set aside the verdict of the jury and to enter judgment in favor of the defendant in accordance with its Motion for Directed Verdict; or, if the foregoing Motion be denied, to set aside the verdict and the judgment entered thereon and grant the defendant a new trial as to all issues, for the following reasons:

## I.

The evidence is wholly insufficient to justify the verdict.

## II.

The evidence is insufficient to justify the verdict in the following respects—

(a) There is no substantial evidence that LaVerl Johnson received the injuries described in the complaint by reason of the negligence, carelessness or disregard of his rights by the defendant in the furnishing of electrical energy or in the operation of an electrical substation as alleged in paragraph II of plaintiffs complaint, or in any other respect whatsoever.

(b) There is no substantial evidence that any of the acts of the defendant were the proximate cause of LaVerl Johnson's injuries.

## III.

The evidence shows that the sole proximate cause of the plaintiff LaVerl Johnson's injuries was the negligence of one H. O. Johnson, Assistant Plant Manager of the Pacific Fruit Express Company, in giving one of two keys, both of which were in his exclusive possession and control, to LaVerl Johnson, thereby permitting the latter, a person inexperienced in working with high voltage electrical current, to enter alone and unaccompanied by any experienced electrician the substation enclosure housing three transformers which had been de-energized and a bank of four lightning arrestors, one neutral, which had not been de-energized, and in in-

structing and directing the said plaintiff to paint wires therein and at which time and place the said plaintiff came in contact with one of the said lightning arrestors resulting in his injuries; and at which time and place the said keys, enclosure and electrical equipment located therein were, and at all times theretofore had been, owned, controlled, managed and operated solely and exclusively by the Pacific Fruit Express Company, a corporation, and its officers, agents and employees; and at which time and place the said transformers and arrestors were not, and at all times prior thereto had not been, defective in any degree whatsoever or hazardous to a greater degree than normally inherent to the equipment itself.

#### IV.

Excessive damages.

#### V.

Excessive damages, appearing to have been given under the influence of passion, prejudice, caprice or sympathy.

#### VI.

The verdict is so excessive that it shocks the sense of justice and shows an utter disregard for the instructions of the court.

#### VII.

The verdict is against law for the reasons hereinabove stated.

#### VIII.

The court erred in permitting plaintiffs' witness Elmer V. Smith to testify over defendant's objec-

tion to the duty of one furnishing electricity to others for the reasons stated in said objection.

### IX.

The court erred in denying defendant's Motion to direct a verdict in its favor at the close of all of the evidence.

### X.

The court erred in giving the second sentence of the following Instruction No. 14:

"The general rule of law is that where one furnishing and supplying electricity for a valuable consideration, merely transmits its electrical current from its line to the consumer's wires, which it did not install and does not control, it has no duty to inspect such wires and is not liable for injuries caused by defects in them. However, where the Company knows of any defects or by the exercise of ordinary care required of a company dealing in electricity, would know of such defects, its duty is to stop and not to send its deadly current to the defective appliance or equipment of the consumer or to and through defective electrical apparatus and it is liable for injuries to person or property caused by a breach of this duty."

For the following reasons—

(a) The same is not the law applicable to the facts in this case.

(b) There is no evidence of any "defects" in the electrical equipment or that the same is "defective electrical apparatus".

(c) There is no evidence that the defendant was "dealing in electricity".

(d) The expression "deadly current" constitutes undue emphasis prejudicing defendant's substantial rights.

## XI.

The court erred in giving the fourth and last sentence of Instruction No. 16, which reads as follows:

"With respect to knowledge on the part of an agent which may be imputed to his principal, the law is that relevant knowledge may be acquired by an agent, either before the time of his employment or after he becomes agent. The important matter is not how the agent acquired the knowledge, but whether or not he had the knowledge when it became relevant in his work for the principal. If the agent has the information in mind at the time it becomes relevant in his work, the principal is bound equally where the knowledge was acquired privately by the agent as where he obtained it while acting as such agent. Therefore where the agents of a company supplying an electric current had or should have had knowledge of a hazardous and dangerous condition of wiring and appliances maintained by a customer, and continued to furnish such current with such knowledge, if injury occurs by reason of such hazardous condition the company is liable for injuries occurring as the proximate result of furnishing such current."

For the following reasons:

(a) The same is not the law applicable to the facts in this case.

(b) There is no evidence that the defendant is "a company supplying electrical current".

(c) There is no evidence that the Pacific Fruit Express Company is "a customer of the defendant" with respect to electrical current.

(d) There is no evidence that the electrical wiring and appliances were hazardous and dangerous to any degree beyond that normally inherent to the same.

## XII.

The court erred in giving Instruction No. 20, reading as follows:

"If from the preponderance of the evidence, you believe that at the time of the alleged injury to LaVerl Johnson, the defendant, Union Pacific Railroad Company, was furnishing electricity to the Pacific Fruit Express Company for a valuable consideration and that the said Union Pacific Railroad Company was advised of or by the exercise of ordinary care the Union Pacific could have and should have known of the conditions that existed at the substation on the date of the accident, and you further find that such conditions were dangerous and hazardous to life and property and that the Union Pacific Railroad Company continued to furnish high voltage electricity through said lines and into said substation and that as a proximate cause thereof LaVerl Johnson was injured, then the defendant was negligent."

For the following reasons:

(a) The same is not the law applicable to the facts in this case.

(b) There is no evidence that the defendant was "furnishing electricity to the Pacific Fruit Express Company for a valuable consideration".

(c) There is no evidence that the "conditions were dangerous and hazardous to life and property" to any degree beyond that normally inherent to the same.

### XIII.

The court erred in refusing to give defendant's requested instruction No. 6 reading as follows:

If you find from the evidence in this case that after the substation was constructed that it was turned over to and accepted by the Pacific Fruit Express Company who thereafter owned, operated or controlled it, then you are instructed that the defendant Railroad Company in this case, by merely furnishing electricity to such substation, can not be held responsible for the injuries to LaVerl Johnson.

### XIV.

The court erred in refusing to give defendant's requested instruction No. 7 reading as follows:

If you find that plaintiff LaVerl Johnson sustained his injuries solely and proximately by reason of someone at the Pacific Fruit Express Company not pulling the switch to cut off the power to the lightning arrestors or that no one at the Pacific Fruit Express Company warned LaVerl Johnson

that the power had not been cut off to the lightning arrestors then the plaintiffs are not entitled to recover and your verdict should be for the defendant. In other words, the defendant Union Pacific Railroad Company cannot be held liable for any acts or conduct on the part of the Pacific Fruit Express Company, its agents, servants or employees.

### XV.

The court erred in refusing to give defendant's requested instruction No. 8 reading as follows:

If you find that the injuries to the plaintiff LaVerl Johnson were caused by the method of operation or the failure to properly operate said substation by the Pacific Fruit Express Company and because of that the plaintiff LaVerl Johnson was injured, then you are instructed that the action or non-action of the Pacific Fruit Express Company was the active, independent, intervening cause and hence the proximate cause of the resulting injury to the plaintiff LaVerl Johnson and your verdict must be in favor of the defendant.

### XVI.

The court erred in refusing to submit to the jury defendant's Special Interrogatory No. 1 reading as follows:

If you return a verdict in favor of the plaintiffs state how and in what manner you find that the defendant Union Pacific Railroad Company was negligent.

Dated this 5th day of December, 1953.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. H. CASTERLIN,

/s/ E. C. PHOENIX,

Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed December 5, 1953.

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[Title of District Court and Cause.]

### MINUTE ENTRY OF DEC. 9, 1953

This cause came on for hearing on Motion to Amend Judgment, and Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, plaintiffs being represented by Messrs. B. W. Davis, L. F. Racine, Jr., and George R. Phillips; L. H. Anderson, Esquire, representing the defendant; and Milton Zener, Esquire, representing the intervenor, Pacific Fruit Express Company.

Upon application of counsel for the Union Pacific Railroad Company, it was ordered that hearing on the Motion for Judgment Notwithstanding the Verdict and Motion for New Trial be continued with the understanding that the Union Pacific Railroad Company file their brief 30 days after they are furnished with a copy of the transcript, plaintiff to have 30 days thereafter to file their brief, and defendant 15 days to reply. After briefs are submitted the matter may be set for oral argument.

It was ordered that the Pacific Fruit Express

Company have 30 days after transcript is furnished to file brief on the Motion to Amend Judgment, plaintiff to have 30 days to answer and Pacific Fruit Express Company 15 days to reply.

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[Title of District Court and Cause.]

### MINUTE ENTRY OF JUNE 21, 1954

This cause came on for oral argument on Motion for Judgment Notwithstanding Verdict and Motion for New Trial, L. H. Anderson, Esquire, appearing as counsel for defendant, and Messrs. B. W. Davis, George R. Phillips and Louis F. Racine, Jr., appearing as counsel for plaintiffs.

After hearing argument of counsel, the Court took the matter under advisement.

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In the United States District Court for the District  
of Idaho, Eastern Division

No. 1775-E

LA VERL JOHNSON and JOLEEN JOHNSON,  
husband and wife, Plaintiffs,

vs.

UNION PACIFIC RAILROAD COMPANY, a  
corporation, Defendant,

PACIFIC FRUIT EXPRESS COMPANY, a cor-  
poration, Applicant for Intervention.

### AMENDED JUDGMENT

This cause having heretofore come on for trial before the Court and the jury, all parties appear-

ing by Counsel, and the issues having been fully tried and the jury having rendered a verdict for the Plaintiffs in the amount of Two Hundred Twenty-five Thousand and no/100 Dollars, (\$225,000.00);

That subsequent to the rendering of such verdict for the Plaintiffs, the Intervenor, Pacific Fruit Express Company, a corporation, having filed its Motion to Amend Judgment in accordance with the Complaint of Intervention, and the Stipulations of Counsel heretofore entered into in respect to the said Complaint of Intervention, and that said Motion to Amend Judgment having been granted;

It Is Hereby Ordered, Adjudged and Decreed that the Plaintiffs recover from the Defendant the sum of Two Hundred Twenty-five Thousand and no/100 Dollars (\$225,000.00) with interest at the rate of Six Percent (6%) per annum, and the costs of action, and that the Plaintiffs have execution therefor; and

It Is Further Ordered, Adjudged and Decreed that the Intervenor, Pacific Fruit Express Company, a corporation, is entitled to and shall be paid from the proceeds of such Judgment upon payment thereof the sum of Five Thousand Five Hundred and 26/100 Dollars (\$5,559.26) with interest at the rate of Six Percent (6%) per annum from the 25th day of November, 1953, and for such other and further amounts as may be paid by Pacific Fruit Express Company, a corporation, Intervenor, to the Plaintiffs on account of or by reason of a certain Compensation Agreement heretofore made and entered and approved by the Industrial Accident

Board of the State of Idaho in the matter of La Verl A. Johnson, Claimant, vs. Pacific Fruit Express Company, a corporation, Employer-Self Insured, and award entered by the Industrial Accident Board of the State of Idaho under date of August 3, 1951, and the Supplemental Agreement entered into and filed with the Industrial Accident Board of the State of Idaho under I.A.B. File No. 11-286 on the 25th day of April, 1952.

Witness the Honorable Chase A. Clark, Judge of said Court, and the Seal thereof, this 16th day of August, 1954.

/s/ CHASE A. CLARK,  
District Judge

[Endorsed]: Filed August 16, 1954.

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[Title of District Court and Cause.]

### ORDER

The Order filed in this matter on July 21, 1954 was later recalled because of the necessity of filing an amended judgment by reason of stipulation entered into by counsel for the Plaintiff and Defendant and Counsel for the Pacific Fruit Express Company at the time of trial. The said judgment having been filed on August 16, 1954, brings the matter before the Court on "Motion for Judgment Notwithstanding the Verdict and Motion for New Trial".

The Plaintiff, a resident of Idaho, instituted suit

in this Court charging the defendant with negligence which caused serious damage to the Plaintiff. The case was tried before a jury and a verdict in the amount of \$225,000.00 was returned.

The Court has gone over the record carefully in considering this motion and although some of Defendant's contentions are not without merit I find no prejudicial error in the record.

It is urged that the amount of the verdict is excessive. This is a large verdict and that contention must be given careful consideration by the Court. It must be borne in mind however that the plaintiff was seriously burned and maimed by electrical energy to an extent that it required the amputation of both his legs slightly below the knees and required the amputation of his right arm at the shoulder. Plaintiff also suffered extreme shock to his entire nervous system. He was hospitalized for long periods of time and his pain and suffering were intense. He had undergone five amputations prior to the trial of this case. He is confronted with suffering, disability and humiliation for the rest of his life,—fixed by the mortality tables at forty years. The evidence discloses that because of his condition he seriously contemplated suicide.

In this case the Plaintiff prayed for \$300,000.00 damages, and at the conclusion of the trial the Court instructed the jury, among other things, that if it determined that the defendant was negligent and because of such negligence the Plaintiff suffered damages, then, damages should be assessed in an amount deemed fair and just, not exceeding the

amount prayed for. No exception was taken to the Court's instruction in this regard, in fact no mention was made by counsel for the Defendant, either during the trial or in the argument to the jury, that the amount prayed for was excessive.

The Court also instructed fully as to the measure of damages and there is no doubt in the Court's mind but what the jury conscientiously considered this phase together with all other phases of the instructions before arriving at its verdict.

After the instructions were given to the jury counsel were advised to note any exceptions they might have to those instructions. It has been the policy of this Court, where any exceptions are taken, to give careful consideration to the exceptions and if the Court feels that the instructions should be corrected or changed in any way to call the jury and instruct them further. This procedure was followed in the instant case.

The jury in this case was a very competent and able jury, made up of outstanding citizens residing within the division. It returned a verdict for \$225,000.00, which, as stated above is a large verdict. They had before them, however, the evidence,—the crippled condition of the Plaintiff. Twelve jurors decided that this amount was fair and just.

Although it is the Court's responsibility not to permit juries to return excessive verdicts, if I change the verdict I must use my own judgment and not accept the jury's judgment. This Court

stated its views on jury trials in the case of Boice vs. Bradley, et al., 92 Fed. Supp. 750.

“As a broad general rule, the damages must be reasonable whether merely actual damages or actual and exemplary damages. Unless the amount is so unconscionable as to impress the Court with the injustice of the award and thereby induce the Court to believe that the jury was actuated by passion, prejudice or partiality, there will usually be no interference with the jury’s verdict. At the very threshold of this inquiry it must be remembered that the Constitution of the United States, Amendment 7, and of this State art. 1 §7, as well as all other States has secured the right of trial by jury in civil actions by the words “shall be preserved” or, as stated in the Constitution of the State of Idaho, “shall remain inviolate”. If this mandate is to be obeyed the Court must proceed with caution when a motion such as is now before the Court is considered, with the thought in mind that if the Court is going to set aside the verdict for no reason except that the Court feels it is excessive, this Constitutional provision will be violated and a jury trial would be a useless thing if in the final outcome the Court could supplant its opinion in place of the opinion of the jury.”

No doubt it is the duty of the Court to grant a new trial or reduce the amount of the verdict when he is of the opinion that the verdict is so excessive that it indicates that the jury was influenced by passion, prejudice or other improper motives, or,

after making all due allowances, the verdict is clearly arbitrary or such as to shock the conscience.

I cannot find these reasons to exist in this case.

The motion for new trial and motion for judgment notwithstanding the verdict will be denied and it is so Ordered.

Dated this 16th day of August, 1954.

/s/ CHASE A. CLARK,  
Chief Judge, United States District Court for the  
District of Idaho.

[Endorsed]: Filed August 16, 1954.

---

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that the Union Pacific Railroad Company, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered against it in this action on the 25th day of November, 1953, and from the judgment as amended August 16, 1954, and from the Order denying defendant's Motion for New Trial and its Motion for Judgment n.o.v., dated August 16, 1954.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. C. PHOENIX,

Attorneys for Appellant

[Endorsed]: Filed August 20, 1954.

[Title of District Court and Cause.]

### SUPERSEDEAS AND COST BOND

Know All Men By These Presents, That we, Union Pacific Railroad Company, as principal, and Continental Casualty Company, as surety, are held and firmly bound unto LaVerl Johnson and Joleen Johnson, husband and wife, in the full and just sum of Two Hundred Sixty Thousand and No/100ths Dollars—(\$260,000.00), to be paid to the said LaVerl Johnson and Joleen Johnson, husband and wife, their successors, administrators, executors and assigns, to which payment well and truly to be made, we bind ourselves and our successors, heirs, administrators, and executors, jointly and severally, by these presents.

Sealed with our Seals and dated this 19th day of August, 1954.

Whereas, on the 25th day of November, 1953, in an action pending in the United States District Court for the District of Idaho, Eastern Division, entitled LaVerl Johnson and Joleen Johnson, husband and wife, plaintiffs, against Union Pacific Railroad Company, defendant, a Judgment was rendered against said defendant, which Judgment was amended August 16, 1954; and said defendant has, or is about to file a Notice of Appeal from said Judgment, to the United States Court of Appeals for the Ninth Circuit to reverse the Judgment.

Now, Therefore, the condition of this obligation is such that if the said Union Pacific Railroad Com-

pany shall prosecute its appeal to effect and shall satisfy the Judgment in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interest and damages as the said Court of Appeals may adjudge and award, then this obligation to be void; otherwise to be and remain in full force and effect.

UNION PACIFIC RAILROAD  
COMPANY, Principal

/s/ By L. H. ANDERSON,

One of its Attorneys of Record

[Seal]

CONTINENTAL CASUALTY  
COMPANY, Surety,

/s/ By KEITH G. MOLLERUP,

Its Attorney-in-Fact and Resident  
Agent

Approved this 20th day of August, 1954.

/s/ CHASE A. CLARK,  
Chief District Judge

[Endorsed]: Filed August 20, 1954.

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[Title of District Court and Cause.]

DEFENDANT'S REQUESTED  
INSTRUCTIONS

\* \* \* \* \*

No. 1. You are instructed that under the evidence in this case that the plaintiffs are not entitled

to recover against the defendant and you are accordingly directed to return a verdict in favor of the defendant Union Pacific Railroad Company and against the plaintiffs, LaVerl and Joleen Johnson.

\* \* \* \* \*

No. 6. If you find from the evidence in this case that after the substation was constructed that it was turned over to and accepted by the Pacific Fruit Express Company who thereafter owned, operated or controlled it, then you are instructed that the defendant Railroad Company in this case, by merely furnishing electricity to such substation, can not be held responsible for the injuries to LaVerl Johnson.

No. 7. If you find that plaintiff LaVerl Johnson sustained his injuries solely and proximately by reason of someone at the Pacific Fruit Express Company not pulling the switch to cut off the power to the lightning arrestors or that no one at the Pacific Fruit Express Company warned LaVerl Johnson that the power had not been cut off to the lightning arrestors then the plaintiffs are not entitled to recover and your verdict should be for the defendant. In other words, the defendant Union Pacific Railroad Company cannot be held liable for any acts or conduct on the part of the Pacific Fruit Express Company, its agents, servants or employees.

No. 8. If you find that the injuries to the plaintiff LaVerl Johnson were caused by the method of operation or the failure to properly operate said substation by the Pacific Fruit Express Company

and because of that the plaintiff LaVerl Johnson was injured, then you are instructed that the action or non-action of the Pacific Fruit Express Company was the active, independent, intervening cause and hence the proximate cause of the resulting injury to the plaintiff LaVerl Johnson and your verdict must be in favor of the defendant.

\* \* \* \* \*

Special Interrogatory No. 1

If you return a verdict in favor of the plaintiffs state how and in what manner you find that the defendant Union Pacific Railroad Company was negligent.

Answer:.....

[Endorsed]: Filed November 24, 1953.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,  
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP) to-wit:

1. Complaint.
2. Summons with return attached.
3. Motion to Dismiss.

4. Motion for More Definite Statement.
5. Motion to Strike.
6. Notice Requiring Submission of Motions on Brief.
7. Withdrawal of Notice Requiring Submission of Motions on Brief.
8. Notice of Filing Depositions of LaVerl Johnson, et al.
9. Defendant's Interrogatories to Plaintiffs.
10. Minute Entry of May 11, 1953.
11. Notice of Hearing Objections to Interrogatories.
12. Objections to Interrogatories.
13. Notice of Taking Depositions of L. J. Kovanda.
14. Minute Entry of May 18, 1953.
15. Answers to Interrogatories.
16. Answers to Interrogatories.
17. Notice of hearing objections to Subpoena Duces Tecum.
18. Defendant's Interrogatories to Plaintiffs.
19. Objections to Interrogatories.
20. Answer.
21. Order Denying motion to produce.
22. Motion to produce.
23. Affidavit in Support of Motion.
24. Notice Requiring Submission of Motions on Brief.
25. Notice of Taking Deposition of L. V. Chausse.
26. Notice of Taking Deposition of H. A. Shupe.
27. Motion to Intervene as Plaintiff.

28. Notice of Motion for Leave to Intervene.
29. Minute Entry of November 9, 1953.
30. Notice of Acts of Negligence.
31. Answer to Defendant's Interrogatories to Plaintiffs.
32. Minute Entry of November 18, 1953.
33. Minute Entry of November 19, 1953.
34. Minute Entry of November 20, 1953.
35. Minute Entry of November 23, 1953.
36. Minute Entry of November 24, 1953.
37. Minute Entry of November 25, 1953.
38. Verdict.
39. Judgment.
40. Memorandum of Costs and Disbursements.
41. Notice to Tax Costs.
42. Objections to Cost Bill.
43. Motion to Amend Judgment.
44. Stipulation that allegations in Complaint in Intervention are true.
45. Motion for Judgment Notwithstanding the Verdict and Motion for New Trial.
46. Motion for Stay.
47. Order Granting Stay.
48. Order Granting Leave to Intervene.
49. Stipulation dated December 7, 1953.
50. Notice of hearing on Motion for Judgment, etc.
51. Notice of hearing on Motion to Amend Judgment.

52. Minute Entry of December 9, 1953.
53. Minute Entry of June 21, 1954.
54. Order Denying Motion for New Trial, etc.
55. Order Recalling Order of July 21, 1954.
56. Order Granting Motion to Amend Judgment.
57. Amended Judgment.
58. Order Denying Motion for New Trial, etc.
59. Motion for Supersedeas.
60. Order Granting Supersedeas.
61. Notice of Appeal.
62. Supersedeas and Cost Bond.
63. Reporter's Praecipe.
64. Notice to Appellees.
65. Designation of Record on Appeal.
66. Defendant's Requested Instructions.
67. Plaintiff's Requested Instructions.
68. Transcript of Testimony.
69. Exhibits Nos. 1 to 36 inclusive, except Nos. 15 and 19.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 31st day of August, 1954.

[Seal]            /s/ ED M. BRYAN,  
                         Clerk

In the United States District Court for the District  
of Idaho, Eastern Division

No. 1775

LAVERL JOHNSON and JOLEEN JOHNSON,  
husband and wife, Plaintiffs,  
vs.

UNION PACIFIC RAILROAD COMPANY, a  
corporation, Defendant.

### TRANSCRIPT OF PROCEEDINGS

This matter came on for trial at Pocatello, Idaho, before the Honorable Chase A. Clark, United States District Judge, sitting with a jury, on November 18, 1953.

Appearances: Ben W. Davis, Esq., L. F. Racine, Jr., Esq., George R. Phillips, Esq., Pocatello, Idaho, Attorneys for the Plaintiffs. Bryan P. Leverich, Esq., Salt Lake City, Utah, L. H. Anderson, Esq., E. H. Casterlin, Esq., E. C. Phoenix, Esq., Pocatello, Idaho, Attorneys for the Defendant.

November 18, 1953, 10:00 o'clock, a.m.

(Selection of jury.)

(Opening statement by Mr. Racine.)

JOLEEN JOHNSON

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Racine): Will you state your name?

(Testimony of Joleen Johnson.)

A. Joleen Johnson.

Q. Have you ever been a witness before, Joleen?

A. No, sir, I haven't.

Q. Then you will address your remarks to the jury and talk loudly enough so that the jury and the Court and counsel and the court reporter can hear you. You are one of the plaintiffs in this case?

A. Yes, sir.

Q. What is your age?                      A. 22.

Q. You are married to Laverl Johnson?

A. Yes.

Q. When were you married to Laverl?

A. March 25, 1949. [1\*]

Q. You were his wife on November 4, 1950?

A. Yes, sir.

Q. Where was Laverl Johnson working on November 4, 1950?

A. For the Pacific Fruit Express.

Q. And where, in what city?

A. Pocatello, Idaho.

Q. In what part of the Pacific Fruit Express was he working?

A. He was working in the ice plant.

Q. When were you first notified of any injuries received by your husband on November 4, 1950?

A. About 3:30 in the afternoon.

Q. When did you first see Mr. Johnson after the injuries, that day?

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\* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Joleen Johnson.)

A. Shortly after that, when one of the fellows got me and took me to the hospital.

Q. And where was your husband?

A. In what they call the out-patient department.

Q. Will you just describe what you observed as to your husband at that time and place?

A. I never had heard of anybody being electrocuted and living——

Q. ——Just describe what you saw, Joleen?

A. When I got there he was lying on a table and his head tossing from one side to the other in apparently pain. The lower part of his legs and his feet were terribly [2] burned, his toes were all crimped up tight and yellow, just a horrible sight. His hand was in a position like this (indicating), he had a black glove on and two or three of his fingers were burned completely away.

Q. Were you able to carry on any conversation with your husband?

A. No, I talked to him and he would answer but it would not be coherent, he would just moan or mumble, he didn't know what he was saying.

Q. After that occasion there, immediately after the injuries, when did you next see your husband?

A. They kept him there until the sedative took effect and then they took him to a room and after he was placed in bed I was allowed to go in again.

Q. What did you observe about your husband then?

A. Well, he was a little calmer then but he didn't realize what was going on, I don't think.

(Testimony of Joleen Johnson.)

Q. Did you have any conversation with him then?

A. Only the fact that I was there and he seemed to know that I was there and that he was hurt. Other than that,—well, he was in quite a bit of pain.

Q. What did you do, Mrs. Johnson, insofar as staying at the hospital those next few days?

A. They had him in a semi-private room in the old Nurse's Home, in a wing off the hospital, and the authorities [3] permitted me to stay with him, I stayed for 36 hours, then I would go home and his father would come and take over and then I would come back and be with him for another 36 hours.

Q. State what you observed prior to the operation on your husband's limbs, as to his condition and your ability to converse with him?

A. Well, he was in a lot of pain, and in being given morphine and codeine every four hours he wasn't awake enough of the time to talk very much. When we did talk he would just ask the same questions over and over,—how the family was, how he got hurt and why it happened to him, and questions of that sort.

Q. Now, how long did that condition go on after November 4, 1950, while your husband was in the hospital, that is, that condition insofar as being able to converse with him?

A. Well, he had his first amputation about a

(Testimony of Joleen Johnson.)

week after he came in and after each of these amputations I believe he was given large quantities of drugs. During that time he would be more or less in an unconscious state and when they would wear off he would talk a little, but he would not be very coherent. A couple of days later he would have another amputation and then it would be a [4] couple of days again before he would make much sense, and about a week passed and then he had the third amputation and the same process again that was as to him being coherent, he was incoherent and it was about the last of January or the first of February he was still getting dope, morphine and drugs,—not as much as at first but he was still getting them.

Q. During that time what is the fact as to whether or not you could carry on an intelligent conversation with your husband?

A. Well, sometimes they would seem intelligent at the time but in a couple of days he would ask the same thing over and I could see that he didn't remember that we had gone over that before.

Q. How long did that condition go on, to your knowledge?

A. That serious, while he was in the hospital, and after he was released from the hospital he would get periods like that at home. People would come to see him and he wouldn't remember them after they had gone for a while. Our conversations would be quite repetitious.

(Testimony of Joleen Johnson.)

Q. Who took care of business affairs, if you had any, during that time?      A. I did. [5]

\* \* \* \* \*

Q. Do you recall when Laverl became surgically healed?

A. Yes, it was in the latter part of October, 1952. Previously we had been talking to Mr. W. R. Wade,—he is connected with the Union and he told us also——

\* \* \* \* \*

Q. Now, Mrs. Johnson, when did Laverl come home from the hospital, if you remember?

A. In the daytime he was released, that is, during the day about the 1st of February but he was to return each evening and stay the night in the hospital.

Q. How long did that continue, if you remember?

A. Well, I think about the rest of that month, February. Then I think he was released from going to the hospital at all around the 1st of March.

Q. When was he taken home, was it at that time?

A. Yes, to stay. He had been coming home every day during February and returning to the hospital at night.

Q. How had he been coming home?

A. I had taken the car every day and he had gotten in a [16] wheelchair and then we put him in the car and took him home and put him in the wheelchair and he was taken in the elevator that

(Testimony of Joleen Johnson.)

my Grandfather had built, he was taken up to the apartment.

Q. After your husband was out of the hospital, what is the fact as to whether there was further treatment?

A. Yes, we were to go to the dispensary.

Q. What dispensary was that?

A. That was the Union Pacific dispensary there by the subway, we were to go every evening to have the stumps dressed.

Q. Did you do that?           A. Yes, we did.

Q. And what is the fact as to how long that continued?

A. That continued from March of 1951 up until about the first of May, 1951, every evening.

Q. What is the fact as to whether or not Laverl was given sedatives and drugs, to your knowledge, during that time?

A. He complained quite a bit of the pain to the nurses there and said that he would like something that would ease it and help him to sleep. They gave him sometimes as much as two boxes at a time about like that (indicating). They were full of yellow and black capsules. I don't know what they were but they did ease the pain and help him to sleep.

Q. Did he take them?           A. Yes, sir. [17]

Q. How did he act, what did you observe about him when he took those pills?

A. They would put him in,—it would not be an unconscious form but it would make him so that

(Testimony of Joleen Johnson.)

he would not know what was going on. It made him tired and sleepy and kind of groggy.

Q. How often did he take those pills?

A. Sometimes two or three a day, it would vary, sometimes it was two or three every four or five hours, and other days the pain would not be so bad and he might not take them until before he went to bed at night.

Q. Did he take them every day?

A. Yes, sir.

Q. How long did that continue, do you recall?

A. As near as I recall up until the first of May when he was admitted to the hospital again.

Q. What was that admission into the hospital in May of 1951?

A. He went back for further surgery on the stumps, with the advice of Dr. Nelson who came into the case in May.

Q. How long was he in the hospital on that occasion, if you know?

A. I think it was just about a month,—the month of May.

Q. Then did he come out?

A. Yes, and he entered Idaho State College, the summer session.

Q. At that time?      A. Yes, sir. [18]

Q. When, if he did go back to the hospital again?

A. Yes, he did, in the latter part of July.

Q. 1951?      A. Yes, sir, 1951.

(Testimony of Joleen Johnson.)

Q. Now, did your husband finish summer school that summer?           A. Yes, sir, he did.

Q. What was the fact during that time, after May of 1951, and during June as to whether or not you were still going to the dispensary?

A. We didn't go to the dispensary itself but about one week and then we went up to the Bannock County out-patient department and Dr. Nelson would come down and look at his legs.

Q. Was your husband taking any drugs during that time, to your knowledge?

A. I think they gave him some shots while he was there, while the doctor was dressing the wounds.

Q. On each occasion?           A. Yes, sir.

Q. To your knowledge, what occurred in the fall of 1951 so far as the treatment of Laverl's condition is concerned?

A. During the latter part of August he was fitted by Dr. Nelson in a plaster cast to be sent to Boise to the Limb Company, to be fitted for limbs. We went one week end and had a rough fitting and then we went the next week [19] and got the legs when they were finished. He stayed at the Elk's Convalescent Home in Boise for them to teach him how to use his legs. [20]

\* \* \* \* \*

Q. Now, Mrs. Johnson, just tell the Court and jury what you have had to do so far as helping LaVerl since this accident occurred, in getting around and helping him to use his limbs?

(Testimony of Joleen Johnson.)

A. Do you mean from the very beginning or now?

Q. Well, just what you have had to do since this accident?

A. Well, my grandfather gave LaVerl a wheelchair for Christmas and it was there for his use whenever he wanted to go any place. At the beginning we had to help him into a wheelchair and then I would push him around. When he left the hospital to come home during the day I would always go to the room and he would get in the wheelchair and then we helped him in the car. I would put the wheelchair in the car and we would go home and then the same procedure at home again until we got him upstairs. All of the time that he was in the wheelchair I, or someone else, would have to [22] push him. During the six weeks that he was going to college in the summer of 1951 I had to take him to school and there would be two or three fellows there that would help him upstairs and into the buildings and take him to class, but I went there every day to help take him to school and to bring him home again. After he got his legs there was the care of washing and taking care of the stump sox and helping him on with his legs and his arm, and, of course, doing things for him that he couldn't do.

Q. Did that continue down to the present time?

A. Yes, there are still things that he cannot do, that I have to do for him.

(Testimony of Joleen Johnson.)

Q. Who helps him on with the legs and the arm?           A. I do.

Q. Have you had occasion, since the last operation in July, 1951, to observe LaVerl's stumps, his limbs, as to their condition?

A. Yes. After July when they had healed to the extent that he could get fitted with limbs there would still be sores on them which would make it painful for him to walk on them and the bottom of one of his stumps still isn't quite healed the way it should be.

Q. What do you do every night, so far as his legs are concerned?

A. Take them off and stand them in a corner.

Q. Is there any dressings or taping to do?

A. No. [24]

\* \* \* \* \*

Q. In November of 1950 did you know of your own knowledge and do you know now what LaVerl's earnings were at that time?

A. Around \$300.00 a month, I believe.

Q. And what is LaVerl doing at this time,—at the time of this trial?

A. Going to school; the Idaho State College. He is also on part time selling ads for the Intermountain Alameda Enterprise.

Q. How much time does he work there?

A. I guess altogether it would be about one day out of a week. He doesn't do it all in one day, it varies. He does it when he gets time off from his school work.

(Testimony of Joleen Johnson.)

Q. Do you know how much he earns there?

A. It depends on the ads that he sells and the service he renders. [25]

\* \* \* \* \*

Q. Mrs. Johnson, have you now, as best you recall, described the condition of Mr. Johnson, your husband, from immediately following the accident up to June 1st, 1951?

A. Yes, sir, as nearly as I can remember. During that time while we were at home he was quite despondent, he didn't talk very much and when he did talk it was a lot about wondering why the accident happened to him and about taking his own life and ending it all. We had a gun, a pistol, and he talked about taking the pistol and ending it all, and how much better off I would be if he wasn't around, and he also took an overdose of those pills that we got from the dispensary, at one time. [26]

\* \* \* \* \*

#### Cross Examination

Q. (By Mr. Anderson): Mrs. Johnson, LaVerl was employed by the Pacific Fruit Express, wasn't he?      A. Yes.

Q. And if at times we use the term PFE we mean Pacific Fruit Express, is that correct?

A. I guess so.

Q. He never was employed by the railroad?

A. No, sir.

Q. And his boss, Mr. H. O. Johnson, he was also Assistant Plant Manager for the Pacific Fruit Express?      A. That is what I understand.

(Testimony of Joleen Johnson.)

Q. Mr. Johnson never worked for the railroad either, did he?

A. I don't know about that. [27]

\* \* \* \* \*

Q. After he went to the hospital, sometime afterwards and before he was discharged about March 1, 1951, prior to that time, was he permitted to leave the hospital in the daytime and come back home?

A. Yes, during February, about the last three weeks.

Q. You took him back to the hospital at night, I believe you said?

A. Every night, yes, during the night he was at the hospital.

Q. You think that he left the hospital, the first time, about March 1st?

A. Permanently discharged, yes.

Q. Was he ever, prior to his discharge from the hospital, and say in December, did he go down to the dispensary for shots or anything of that sort?

A. In December of 1950?

Q. Yes.

A. No, sir, he was in the hospital all of the time.

Q. He was never at the dispensary in December?

A. Not at that time, not that I remember, I am sure that he [28] was confined to his room in the hospital all that time.

Q. When he got to the hospital I think you said

(Testimony of Joleen Johnson.)

or he said that he slept for several days, is that right?

A. It may have been sleeping or unconsciousness or even a coma, I don't know what the medical term would be.

Q. You did say, I think, that when he got to the hospital he was not entirely rational but that he was conscious?

A. It seemed to me that he was conscious, yes.

Q. And he became rational sometime about the following Wednesday after the accident which was on Saturday, at least for a short period of time?

A. He may have.

Q. And then as time went on these rational periods got longer, didn't they?

A. Well, whenever he would have these amputations he would take shots and they would be increased for the severe pain that he had, the shots would be increased in amount and then he would not be rational.

Q. That is when he was under these sedatives?

A. Yes, and this would go on for two or three days.

Q. But he did become rational for short periods of time on or about the following Wednesday after the accident on Saturday?

A. I don't recall as to that.

Q. Do you remember that you so testified in a deposition that [29] was taken on April 29, 1953?

A. I remember testifying at a deposition.

(Testimony of Joleen Johnson.)

Q. And do you remember that you did testify to that effect, that he was rational?

The Court: Is the deposition here so that you can show it to her?

Mr. Anderson: Yes, it is.

Q. Would you look on page 71?

A. This isn't my deposition, this is the deposition of Mr. Shupe.

The Court: She has been handed the wrong deposition, Mr. Anderson.

Q. Now, Mrs. Johnson, if you have the right deposition will you turn to page 71, about the middle of the page?

A. I see it, I think I have it, yes.

Q. And the question was asked: "How soon afterward was he rational?" and then your answer: "He was hurt on Saturday and then Monday he had his first amputation and then it was at least two days before he was fully recovered from the amount of medication that they had administered to him and he was able to talk very long at all and be rational in speaking." Then my question: "Of course, from then on he commenced to have longer periods of rationalness?" and your answer: "Yes." Then my question: [30] "Those periods extended, of course, I suppose your discussions extended, about various things?" And your answer was "Yes", and another question: "He was rational then when he would discuss these questions?" and your answer again was "Yes". Now, that is correct, isn't it, Mrs. Johnson?

(Testimony of Joleen Johnson.)

A. That is right, may I explain something there?

The Court: Yes, you may.

A. On this answer the fact that he was hurt on Saturday and the first amputation was on Monday, I think that it was a week from that Monday. He was in the first room that they took him to for almost a week before he had his first amputation.

Q. Other than that your answer in the deposition, all of your answers there are correct?

A. Yes, other than it would not be two days after the accident that he had his first amputation, it would be a week after that.

Q. Was Dr. Hughart the only doctor that attended LaVerl at the hospital?

A. When he first came in there for emergency treatment Dr. Hughart took care of him, he was the first one there, yes.

Q. Did he take care of him all of the time afterwards until he was discharged about March 1st?

A. He and Dr. Forrest Howard and Dr. Dean Hartvigson.

Q. And while we are on that subject, did Dr. Hughart also take care of him later at the dispensary?

A. Yes, he did.

Q. Was he the only doctor?

A. Up until May.

Q. Do you remember about the first time that you took him to the dispensary?

A. It would have been right around the 1st of March, I imagine, when he was discharged from the hospital that we started going up there.

(Testimony of Joleen Johnson.)

Q. During the time that he was home in the day-time? A. That was February.

Q. Yes, during the daytime when he was home did you take him up there to the dispensary?

A. No, because he was to return to the hospital each evening.

Q. If he left the hospital March 1st then I believe that you took him back every night after that for dressing for about two weeks, is that correct?

A. No, we went every night until May.

Q. To the hospital?

A. No, to the dispensary.

Q. I meant to the hospital?

A. Oh, yes, I believe so.

Q. After he was discharged you took him back to the hospital [32] for about two weeks, every night? A. Yes, as I recall.

Q. After that you took him to the dispensary?

A. Yes, sir.

Q. While he was at home in February and March, I rather imagine that you discussed many subjects with him? A. Yes, sir.

Q. When you did that he was all right and knew what he was doing?

A. He seemed to be, yes.

Q. In discussing these several matters there were some things that you had to do that he couldn't do because of his physical injuries, but if he had not been injured, that is, if it had not been for his physical injuries so that he could move about, he could have transacted his business then, couldn't he?

(Testimony of Joleen Johnson.)

A. I would say physical and mental disabilities.

Q. I wish you would again refer to your deposition, on page 74,—at the top of page 74?

A. Yes, I have it.

Q. There is a question there: “And in connection with the business you and he discussed it and in some instances he took care of it and sometimes maybe you took care of it, is that right?” and then your answer: “Well, we always talked it over and then I would go ahead and do [33] it because he wasn’t in any condition to get around and do it.” Then the question: “But other than that he could have done it, couldn’t he, if it hadn’t been hurt, that is, if it hadn’t been for his condition, and of course he could have done it the same as you could?” and your answer: “If he hadn’t been hurt, yes.” That is correct, is it?

A. That is correct. May I explain?

The Court: Yes, you may.

A. In your question you didn’t state whether it was physical or mental and that is the way I was answering it. I meant that if he had not been hurt at all he would have been just as normal as you or I and he could have carried on his own transactions, but inasmuch as he was hurt and in his physical condition and his mental condition he couldn’t carry on his own affairs.

Q. But you did state that you did talk these matters over?      A. Yes.

Q. And you said that because he wasn’t in any

(Testimony of Joleen Johnson.)

condition to get around you went ahead and did it?

A. That is true. [34]

\* \* \* \* \*

Q. Mr. Johnson is taking pre-law at college now, is he?

A. It is a social science course and the studies would entitle him to take law and finish in a law school, if he so desired.

Q. He drives his own automobile?

A. Yes, he does.

Q. And has been driving since early in 1952?

A. Let's see, in September of 1951 he got his legs and it was the latter part of '51, I believe, that he started to drive his own car.

Q. He has a driver's license?

A. Yes. [59]

\* \* \* \* \*

### Redirect Examination

Q. (By Mr. Racine): What is the fact as to whether LaVerl could write at that time other than his signature?

A. His signature was what he had been practicing on more than anything. He had been practicing writing but it made him emotionally upset to think that he could not do any better than he was doing. His signature was legible, sometimes, however. [62]

\* \* \* \* \*

Q. What is the fact as to who was handling all of the business transactions involving yourself and

(Testimony of Joleen Johnson.)

LaVerl from the time that he got out of the hospital until about June 1st?

A. I took care of them.

Q. What is the fact as to who made the decisions as to what was going to be done?

A. I did, he wasn't in any position to do it.

Q. What is the fact as to whether you discussed it with other members of your family?

A. I did, they gave me ideas who to go and see to get these figures and on other matters, but when a final decision was made, I made it. \* \* \* \* \* [64]

### PATRICIA E. BROWN

Called as a witness by the plaintiff, after being first duly sworn testifies as follows:

#### Direct Examination

Q. (By Mr. Racine): Your full name is Patricia E. Brown? A. Yes, sir.

Q. Where do you reside?

A. 823 South Ninth Avenue, Pocatello, Idaho.

Q. What is your occupation or position?

A. I am Medical Records Librarian at the Bannock Memorial Hospital.

Q. As such records librarian, what type of records do you have under your control?

A. The receiving records of any patient who was ever admitted to the old General Hospital of Pocatello and the Bannock Memorial Hospital of Pocatello and the hospital records of those patients.

(Testimony of Patricia E. Brown.)

Q. Do you have the records pertaining to La-Verl Johnson? A. Yes, sir, I have.

Q. Do you have them with you in court?

A. I have.

Q. Mrs. Brown, you have been handed what has been marked as Plaintiffs' Exhibit No. 9, can you identify that? A. Yes, sir, I can.

Q. Would you do so?

A. This is the hospital admission record of La-Verl A. Johnson with a date of admission being November 11, 1950.

Q. November 11?

A. Pardon me, 11-4-1950, that is November 4, 1950.

The Court: Perhaps I should not ask this question but you do not question these hospital records, do you?

Mr. Casterlin: We haven't seen them. [71]

The Court: I see, I thought if you had they might as well be admitted and get it over with.

Q. For the purpose of speeding this matter, this is the first of the hospital records with reference to LaVerl Johnson, is that right?

A. Yes.

Mr. Racine: We offer Exhibit 9 in evidence.

Mr. Casterlin: It will take some time to go through this.

The Court: That is why I asked if you had any question about these records.

Mr. Racine: We have other records here that we can identify.

(Testimony of Patricia E. Brown.)

The Court: Very well, you go ahead.

Q. You have been handed what has been marked Plaintiffs' Exhibit No. 10, I will ask you if you can identify those?

A. Yes, sir, this is the admission record of Verl A. Johnson, admitted May 2, 1951.

Mr. Racine: We offer Plaintiffs' Exhibit No. 10 in evidence at this time.

Mr. Anderson: I think we should be permitted to look at these.

The Court: I am not going to admit them until you have had that opportunity.

Mr. Racine: I was simply trying to get [72] these all offered so that you could have them all at once.

The Court: You may proceed with your examination.

Q. Mrs. Brown, you have been handed what has been marked as Plaintiffs' Exhibit No. 11. Are you in a position to identify that?

A. Yes, sir, it is the medical record of LaVerl Johnson admitted to the Pocatello General Hospital July 20, 1951.

Mr. Racine: We offer that in evidence at this time.

The Court: Counsel may have that one also to look at.

Q. You are now handed what has been marked as Plaintiffs' Exhibit No. 12, are you in a position to identify that?

A. Yes, sir, this is an outpatient record of the

(Testimony of Patricia E. Brown.)

Pocatello General Hospital, it is a record of an outpatient visit of June 9, 1951, and the visit was made by LaVerl Johnson.

Mr. Racine: We offer this exhibit in evidence at this time, being Plaintiffs' Exhibit No. 12.

The Court: That may also be handed to counsel for examination. Are there any other questions from this witness or rather from you, Mr. Racine, to be asked of this witness?

Mr. Racine: I have nothing further. [73]

### Cross Examination

Q. (By Mr. Casterlin): Referring to Plaintiffs' Exhibit No. 9, No. 10 and No. 11, I notice that the preliminary statement in there are in different handwritings, can you tell us who wrote those in, for instance on Exhibit No. 9, the second page and the third page?

Mr. Racine: If the Court please, maybe this is anticipating the cross examination, but I think a few questions might clarify the matter.

The Court: You may take care of it.

A. Am I to answer that question?

The Court: If you can, go ahead.

A. This is in the handwriting of Dr. H. H. Hughart upon both the second and third pages.

Q. I note there are no doctor's signatures on the page?  
A. No, there isn't.

Q. Calling your attention to the second page on Exhibit No. 10, that is in the handwriting of a

(Testimony of Patricia E. Brown.)

different person than on Exhibit No. 9 but that is signed, isn't it?      A. Yes, it is.

Q. Whose signature appears on that?

A. Dr. D. J. Nelson.

Q. Can you tell us off-hand whether or not all of the entries in these records are made by doctors?

A. No, they are not. [74]

Q. Some of the entries are made by whom?

A. By the nurse attending that patient.

Q. Whenever a statement in these exhibits is made by a doctor, does the doctor always sign the pages?

A. No, they don't always. They are supposed to but they don't always.

Q. Whenever a record is made by a nurse, is their identity disclosed in those exhibits?

A. Yes, it is.

The Court: We will recess at this time until 2 o'clock.

November 19, 1953, 2:00 o'clock p.m.

Mr. Casterlin: We have examined the exhibits and have gone over them as far as we were able to read the handwriting, and at this time we object to the exhibits numbered 9, 10 and 11 at this time on the ground that there is no foundation laid to show that these exhibits are an exception to the hearsay rule. It is evident that all of the records were not made by doctors. If there are records made by doctors, the doctors are not present to say that they were made by them or under their super-

(Testimony of Patricia E. Brown.)

vision, at the time the events happened and that the records are correct in those respects. They are not such records as are required to be kept by law. They contain opinions [75] of doctors without basis, therefore the doctors are not present for examination with respect to those opinions. In addition, we object to Exhibit 10 and Exhibit 11 because they show on their face that they pertain to conditions subsequent to March 20, 1951, therefore, they are immaterial and irrelevant in this case, and that applies to No. 12, too. The general objection I wish to go to Exhibit No. 12 also and the special objection to Exhibit No. 12 in addition to Nos. 10 and 11.

May I include in our objection that as the record now stands it is impossible for anyone except one educated in medicine to draw any conclusion from the exhibits as they now stand.

The Court: The objection will be overruled at this time. I will entertain a motion to strike any part of it later and I will strike any portion that I may decide is immaterial. As I understand it, these are hospital records made up from the doctor's record and the nurse's record.

Mr. Racine: We might ask a question or two, with the Court's permission to clear this up.

The Court: I will admit them, Mr. Racine, I think it is well enough known how these hospital records are made up. However, you may go ahead and ask any question you desire. [76]

(Testimony of Patricia E. Brown.)

Redirect Examination

Q. (By Mr. Racine): I will ask you, Mrs. Brown, to state whether or not the records of the hospital particularly the records pertaining to La-Verl Johnson are kept in the regular course of business?      A. They are.

\* \* \* \* \*

DOW B. PETERSON

called as a witness by the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Racine): Your full name is Dow B. Peterson?      A. Yes, sir.

Q. Where do you reside?

A. 715 Hemlock, Pocatello, Idaho.

Q. What is your position?

A. Pharmacist, Bannock Memorial Hospital.

Q. What records do you have under your supervision as pharmacist of the Bannock Memorial Hospital,—what records do you have under your control, supervision and direction?

A. I have to maintain the records of all narcotics received and disbursed at the hospital. [77]

Q. How long have you been pharmacist at the Bannock County Memorial Hospital?

A. I was employed as pharmacist in June, 1953.

Q. At the time you took the position, what was the fact as to any records which were turned over to you?

A. I received all of the previous records main-

(Testimony of Dow B. Peterson.)

tained by the old Pocatello General Hospital and also by the Bannock Memorial Hospital up to the present time, that is, up to that time.

Q. Do you have those with you?

A. Yes, sir.

Q. As they pertain to LaVerl Johnson?

A. Yes, sir.

Q. Now, as to the records under your control and direction, are they kept in conformance with any Governmental regulation or law?

A. They are kept under the Harrison Narcotic Law which is a Federal law.

Q. To your knowledge what is the fact, as to the record concerning LaVerl Johnson?

A. For each time that he received any narcotic it should have been entered on one of those forms as to what the narcotic was, the time it was given, the date, the doctor by whose order it was given and the nurse who administered the medication.

Q. What is the fact as to whether you made a personal examination of the record with respect to LaVerl Johnson?

A. I spent the better part of yesterday and the day before searching through the record picking out the record in which Mr. Johnson's name appeared, together with the doctors who were his doctors.

The Court: You may hand the exhibit to opposing counsel.

Mr. Casterlin: Have you offered it?

(Testimony of Dow B. Peterson.)

Mr. Racine: We will offer this exhibit, Plaintiffs' Exhibit No. 13.

Mr. Casterlin: May I ask the witness a question concerning this?

The Court: You may.

Q. (By Mr. Casterlin): Mr. Peterson, do I understand that you have looked at the original records and have digested them into this?

A. No, sir, those are the original records.

Q. These are the original records?

A. Yes, sir.

Q. All of the pages, I notice, are not joined together. In the interest of time can you tell me what period this record covers?

A. From November, 1950, through the year 1951.

The Court: Is there any objection? [79]

Mr. Casterlin: We object to these records on the grounds heretofore stated with respect to the general hospital records and on the further ground that there is nothing to show that these records kept in connection with the Harrison Narcotic Act are required to be kept as a result of the presence or order of a doctor, and this witness does not know and has not stated that the medication included in the record was actually administered to Mr. Johnson.

The Court: I think there has been some testimony on the part of Mrs. Johnson in regard to the administration of the drugs. I don't think this would be admissible as to drugs furnished after

(Testimony of Dow B. Peterson.)

March 20, 1951. As I understand it, of course, on the one question as to Mr. Johnson's condition, which would toll the statute of limitation, that would apply to about March 20, 1951, from the time of his injury until March 20, 1951. However, these records, no doubt, would be admissible on the other question as to his condition after March 20, 1951. I will admit these records now so far as they pertain to the narcotics furnished to the plaintiff LaVerl Johnson between the date of his injury and March 20, 1951. It is admitted only for the purpose of showing his mental condition in regard to the statute of limitation, as to whether he was justified in not filing the suit within the period of [80] two years.

Mr. Casterlin: It does not run to,—

The Court: Mr. Casterlin, this goes just to his mental capacity prior to March 20, 1951. Only to the question of whether the statute had tolled or whether he was required to have filed this suit.

Mr. Casterlin: Is it the intention of the Court to have this exhibit stripped down to those dates?

The Court: I am just saying to the jury that they should consider it only up to March 20, 1951. Anything after that date will not be considered by the jury. If you want this witness to take the time to take up the balance of the record, you may do so but I don't think there is anything in it which would be prejudicial.

Mr. Casterlin: I think perhaps we should request, after the date of March 20, 1951, those pages

(Testimony of Dow B. Peterson.)

of the record should be eliminated but we agree with the Court that we should not take the time to do it now.

The Court: Perhaps if we do not take the time now and remove the pages as you say you want, if some doctor takes the stand perhaps the whole matter will be admissible.

Mr. Casterlin: I believe that's all we have. [81]

Mr. Racine: No further questions.

### VESTA JOHNSON

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

#### Direct Examination

Q. (By Mr. Phillips): Your name is Vesta Johnson?      A. Yes, sir.

Q. Is it Mrs. Vesta Johnson?

A. Yes, sir, Mrs. Vesta Johnson.

Q. You reside in Pocatello?

A. Yes, 420 East Humbolt.

Q. What is your profession, Mrs. Johnson?

A. Registered professional nurse.

Q. Where did you have your nurse's training?

A. Pocatello General Hospital, Pocatello, Idaho.

Q. And what did that training consist of?

A. Regular course required by any accredited school of nursing in Idaho and we received one semester of special pre-nursing at the University of Idaho Southern Branch.

(Testimony of Vesta Johnson.)

The Court: Will you admit the qualifications of this witness?

Mr. Anderson: We do not know her but I think we will, she has stated enough. [82]

Mr. Phillips: There is one phase of her training that I want to go into, if I may.

The Court: You go ahead. I always use more time by trying to save time.

Q. Will you go ahead and recite your training?

A. We had the usual courses in Psychology and that was in connection with the required, the other required studies besides our floor duty. We spent three months in the University of Oregon at the Durnbaker Children's Hospital, Portland, Oregon, and three months in the Oregon Mental State Hospital in psychiatric affiliation.

Q. Now, that training at the psychiatric hospital, that consisted of both practical work and lectures?

A. Yes, sir.

Q. Do you know the plaintiff, LaVerl Johnson?

A. Yes, sir, I do.

Q. When did you become acquainted with Mr. LaVerl Johnson?

A. November 11, 1950.

Q. What was the occasion for getting acquainted with Mr. Johnson?

A. I was hired at that time as private duty nurse.

Q. Where did you attend him as a private duty nurse?

A. Pocatello General Hospital, Pocatello, Idaho.

Q. How long did you attend Mr. Johnson?

(Testimony of Vesta Johnson.)

A. November 11 to December 30, 1950. [83]

Q. What hours per day, during those times did you attend Mr. Johnson?

A. 3:00 o'clock p.m., until 11:00 o'clock p.m.

Q. Now, will you state the fact as to any pain that Mr. Johnson had during the times you attended him?

Mr. Anderson: We object to that as calling for a conclusion of the witness?

The Court: Well, I imagine he had some pain and I think the nurse would probably know, she may answer.

A. Mr. Johnson evidently was in severe pain the greater part of the time that I was with him.

Q. Will you state of your own knowledge what was done to alleviate that pain?

A. We gave him hypodermic injections and sedatives by capsules, the capsules taken orally.

Q. You say the capsules were taken orally?

A. Yes, by mouth.

Q. Based upon your knowledge of this patient, LaVerl Johnson, as a special nurse, what have you to say as to his mental competency during the time that you attended him?

Mr. Casterlin: I think I will object to that on the ground that a full foundation has not been laid.

The Court: I think she may answer. [84]

She went into the matter of her studies pretty thoroughly on her examination as to her qualifications.

A. Mr. Johnson seemed to be rather confused

(Testimony of Vesta Johnson.)

all of the time that he was there or that I was, he repeated frequently.

Q. Now, just go ahead and explain what you mean, Mrs. Johnson?

A. Well, as I stated he would repeat frequently and he would ask the same questions repeatedly and at various times he told what might be rather fantastic experiences that he had been through, for instance, I remember one in particular that I was told——

Mr. Anderson: ——Who told you?

A. The other nurses that had been on with him.

Mr. Phillips: Don't go into that, Mrs. Johnson just what you observed yourself. It is your opinion that I want, what was your opinion as to his mental competency?

A. My opinion as to his mental competency was that he was not mentally competent.

Mr. Phillips: You may cross examine.

### Cross Examination

Q. (By Mr. Anderson): You stated that he was confused most of the time, you meant the period from November 11, 1950, to December 30, 1950?

A. Yes.

Q. Sometime after November 11 and certainly before December 30, 1950, his condition improved, did it not?

A. Yes, it did improve.

Q. And as his physical condition improved his mental condition also improved?

A. It did to a certain extent.

(Testimony of Vesta Johnson.)

Q. He would have periods of rationalness?

A. He was rational in some respects.

Q. Did you visit with him when you were caring for him?      A. Yes, I did.

Q. And you carried on conversations with him?

A. Yes, sir.

Q. He understood what you were saying?

A. At the time, yes, and then maybe in a day or two or in several hours he would ask me what it was that I had told him.

Q. Was that right after he had taken some sedatives?      A. Not always.

Q. But usually it was?

A. Well, most frequently it was then, but definitely not always.

Q. While you were there along toward the end of the period that you were there he did leave the hospital and go home during the day? [86]

A. I think he did. I remember that he went home for Christmas Day and we did take him for short rides in the car.

Q. At that time his pain had diminished a great deal?

A. It diminished, but according to his statement it never was completely alleviated during the time that I was with him.

Q. Did he know the people that came in the room?      A. Yes, he did.

Q. And he carried on a conversation with them?

A. Yes, sir.

Q. What was the nature of the drug that he was given to relieve his pain?

(Testimony of Vesta Johnson.)

A. I believe that is in the medical record and you would get a more correct record than I can remember.

Q. Did you ever give any to him?

A. Yes, I did.

Q. Do you know what they were?

A. I don't remember.

Q. They were just a pain killer, were they not?

A. Not entirely, it was for pain and restlessness.

Q. Restlessness does not indicate mental incompetency, does it?      A. Well, I don't know.

Q. Ordinarily when we have a pain and take something for it we might go to sleep as a result of the sedative, but when we wake up we are mentally alert, that is the result [87] generally with people?      A. Not always, no.

Q. A pain killer ordinarily has nothing to do with the mentality of a person, does it?

A. Quite frequently it does.

Q. Are you prepared to say that on December 30 when you left there or left him that he was so incompetent at least at times that he could not conduct his own affairs?      A. Yes, sir.

Q. At times he could conduct his own affairs?

The Court: She answered it the other way, Mr. Anderson. I will ask the reporter to read the question and answer.

(Question and answer read by reporter.)

Q. So at times he could not conduct his own affairs but there were times that he could?

(Testimony of Vesta Johnson.)

A. I don't think that I am qualified to answer that.

Q. I thought that you answered it one way, cannot you answer it the other?

Mr. Phillips: We object to that as repetition, it has been answered.

The Court: There is nothing for me to rule upon. Go ahead.

A. I would say that he wasn't except for some minor details.

Q. Minor details, what do you mean by that?

A. Such as saying what he wanted to wear and what he wanted for dinner and such as that, but to carry on business I would say that he wasn't.

Q. At any time during the 24 hours of the day?

Mr. Phillips: I object to that, she has already testified that she was only on duty for eight hours.

Mr. Anderson: For her eight hour period, I will cut it down to that.

The Court: I imagine that she could take in the space between if she was there eight hours out of every 24. You understand the question, do you?

A. Yes, I do, but I cannot state entirely as a fact, it is my personal opinion.

The Court: You are required to give only your opinion, that is all that is expected of you.

A. I would say that he wasn't.

Q. At any time during the eight hour period that you were with him?

A. No.

Mr. Anderson: I think that is all. [89]

(Testimony of Vesta Johnson.)

Redirect Examination

Q. (By Mr. Phillips): Will you state the fact as to whether or not the pain was alleviated even under those drugs?

A. Not entirely, no.

Q. Now, those drugs that were given, you stated on cross examination that they would dull the senses, maybe not in those words?

A. Yes, they will.

Q. And does the senses that you refer to, does that include the mind?           A. Yes, sir.

\* \* \* \* \* [90]

NONA MURPHY

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Phillips): Your name is Nona Murphy?           A. Yes, sir.

Q. Have you ever been a witness in any case before?           A. No, I haven't.

Q. You reside here in Pocatello?

A. Yes, at 3753 Pole Line Road.

Q. And what is your profession?

A. I am a registered nurse.

Q. Where did you have your training? [91]

A. I had approximately two years and nine months at the Seton School of Nursing in Colorado, Colorado Springs, Trinidad, Pueblo, and also in Denver, and one year in the General Hospital at Pocatello.

(Testimony of Nona Murphy.)

Q. What did that training consist of?

A. It consisted of general nurse's training in the field of hospital training and three months affiliation, psychiatric training at Denver and your pediatric training, tubercular training, obstetrics and contagion.

Q. In your three months training in the psychiatric,—

A. —The Denver Psychiatric Hospital.

Q. Did you have training both practical and lectures concerning incompetents?

A. Yes, we did.

Q. Do you know LaVerl Johnson, the plaintiff here?      A. Yes, sir.

Q. When did you get acquainted with LaVerl Johnson?      A. November 10, 1950.

Q. What was the capacity in which you got acquainted with him?

A. I was his special duty nurse from 11:00 p.m. to 7:00 a.m.

Q. How long did you attend Mr. Johnson?

A. I was with him from November 10 to February 4, except for two weeks,—a period of two weeks in December, in the middle of December, I believe it was December 12, to 26, if I remember right. [92]

Q. You were on duty there from what hour to what hour?

A. From 11:00 p.m. to 7:00 a.m.

Q. Will you state, if you know, whether Mr.

(Testimony of Nona Murphy.)

Johnson suffered with pain while you were attending him?

A. I would say that he suffered extreme pain on my shift, when the doctor made his rounds he more or less thought that he could spend more time with Mr. Johnson and on certain occasions he even clipped a few toes from his left foot, before it was amputated.

Q. Those toes were clipped in the room there?

A. Yes, in the hospital room.

Q. Will you state, if you know, what was done to alleviate the pain for Mr. Johnson?

A. He was given hypodermic injections of narcotics and sedation.

Q. Did you give those narcotics at times?

A. Yes, I did, as a rule before the doctor changed the dressings or treated the wounds and quite often I repeated that as soon as the doctor was finished.

Q. Mrs. Murphy, based upon your knowledge as a special nurse with this patient and on your training and experience, what have you to say as to the mental competency of LaVerl Johnson during the time that you were treating or nursing him?

Mr. Anderson: I object to that, I don't [93] think that she is qualified to express an opinion on that.

The Court: I will let the jury weigh her testimony, she has stated her background of education, she may answer.

A. I had several occasions to carry on a con-

(Testimony of Nona Murphy.)

versation with Mr. Johnson and I too discovered that he was confused. On many occasions he told exaggerated, fantastic stories. At one time he was so disturbed,—at that time he was talking on religion, at which time we couldn't quiet him down with sedation. He was talking to members of his church for several hours one night and we couldn't quiet him down.

Q. Was this pain alleviated by the use of this drug or drugs?

A. It didn't appear to be, no. At times he would wake up and complain of pain in the stumps or in his shoulder and I would try to quiet him down, trying to keep the length of time between the narcotics to three hour periods which we tried to do in the hospital. Sometimes they were given oftener than that, however.

Q. I think that you stated that you attended him up to February?

A. February 4, yes.

Q. What was his competency on the date of February 4, if you know?

A. In the last two or three weeks I was with him I didn't [94] have an opportunity to talk or to carry on a conversation very much because he would go to sleep after I changed the dressings on the wounds, but he was still confused and he was still telling these experiences which to me seemed exaggerated. I would not consider him competent at that time, on February 4th, the last time I saw him in the hospital.

(Testimony of Nona Murphy.)

Q. Was he competent at any time prior to that time when you attended him?

A. I would say that he was not, no.

Mr. Phillips: I think you may examine.

### Cross Examination

Q. (By Mr. Anderson): Let us say for the last two weeks, how often did you give hypos or sedatives to Mr. Johnson?

A. He had sedatives every night, before he went to sleep, he required them to go to sleep and get his rest, and as I remember it, he had a narcotic every night too. I cannot be positive in regard to that, the records would have to be checked, but as I remember it, he received hypos at that time.

Q. You say he did or did not?

A. As I remember, he did but I cannot be positive about that.

Q. There were times, I take it, when he carried on an ordinary [95] conversation with you?

A. At the time it seemed to be an ordinary conversation but later on he would repeat things that he had said and he would not remember what he had told me.

Q. Did he have visitors come while you were there?

A. Only at that time that he was talking about religion, he did have some members of his church come in then.

Q. Didn't he have other visitors?

A. His wife was generally with him when I

(Testimony of Nona Murphy.)

came to work but she usually left right after or very shortly after I got there. It was the night hours and there are no visitors often at that time.

Q. But when visitors came they generally carried on a conversation with Mr. Johnson, didn't they?

A. Well, his wife usually talked to me when I came and not to Mr. Johnson.

Q. I don't believe that you answered my question, when he had visitors they usually talked to him?

A. The visitors from his church, the ones that I mentioned, they went in and talked to him but I wouldn't say that his conversation was at all rational at that time.

Q. You talked to him, didn't you?

A. I talked to him while I changed his dressings, yes.

Q. He knew what you were doing for him, didn't he?

A. He knew that I was trying to help him.

Q. What is the difference, Mrs. Murphy, between sedatives and narcotics?

A. Narcotics are given for the relief of pain and a sedative is a hypnotic which is given for restlessness, it doesn't have anything to do with pain to the extent that narcotics do, it will relax a person and let him rest.

Q. By narcotics what do you mean, morphine?

A. Morphine, codeine and demeral, there are many different narcotics.

(Testimony of Nona Murphy.)

Q. Naturally sedatives were not for the pain, they were to allow him to rest?

A. We try to cut down the use of narcotics. When a patient appears to be improving slightly if there is a possible chance to relax him enough by the use of sedatives, where the narcotic is not absolutely necessary we try the sedative first.

Mr. Anderson: I think that is all.

Mr. Phillips: That is all. \* \* \* \* \* [97]

### R. K. HART

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

#### Direct Examination

Q. (By Mr. Phillips): Your name is R. K. Hart and you live in Pocatello, Idaho?

A. That is correct.

Q. What is your occupation, Mr. Hart?

A. I am a public accountant.

Q. You know LaVerl Johnson and Mrs. Joleen Johnson? A. Yes, I do.

Q. Will you state the facts as to your knowing LaVerl Johnson after February of 1951?

A. At that time I was living on Trail Creek, which is two or three blocks from the residence at which he was living when he came home from the hospital. In my capacity as Bishop of the Ward, we, of course, visit all of those who are ill or who have had tragedy occur to them,—I wasn't Bishop at that time but I was interested in him and I vis-

(Testimony of R. K. Hart.)

ited him shortly after he returned from the hospital.

Q. Did you visit him later on in the spring?

A. No, my contact with him later was when he first came to church after that.

Q. And about when was that? [98]

A. I would say about in the early summer or the middle of the summer, the latter part of June or early in July, I would say.

Q. And the occasion that you contacted him at that time, did you have occasion to observe Mr. Johnson?      A. Yes, sir, I did.

Q. Did you talk to him?

A. Yes, we greeted each other and had a few words of conversation.

Q. Will you state and describe to us what you observed about Mr. Johnson at those times?

A. Well, of course, his physical appearance was rather shocking inasmuch as that was the first time that I had seen him. He was very thin, his face was very thin and shrunken. His eyes had a sort of pained expression, if you can put it that way. He seemed very uncertain about talking, in all his talking about anything that he had to say. He seemed quite concerned and ill at ease, I am not sure that I can find any better words to describe it than that. I remember a time or two when he first came to church that he was unable to stay through the proceedings. He had to leave before it was out and I presumed that was because of his physical or mental discomfort or both. \* \* \* \* \* [99]

VIOLET RAE WALDRUN

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Racine): Your full name is Violet Rae Waldrun? A. Yes, sir.

Q. And you reside here in Pocatello?

A. Yes, sir, No. 3 Foothills Drive, Pocatello.

Q. Have you ever been a witness before?

A. No, I have not. [103]

Q. Now, if you will address yourself to the jury and speak loudly enough so they can all hear?

A. Yes, sir, I will.

Q. On and before November 4, 1950, I will ask you if you were acquainted with LaVerl Johnson?

A. Slightly.

Q. On or about November 4, 1950, where did Mr. Johnson live?

A. I don't know just as to that. I knew them after they moved where he lived after he came from the hospital.

Q. Will you explain then the circumstances under which you became better acquainted with him?

A. Yes, sir, we lived in the apartment where her grandmother and grandfather lived, we knew them and the family because we lived with them and we knew them slightly at the time they were married. From then on we were better acquainted and when the accident happened it struck us as a part of the family. We were interested in them as we visited

(Testimony of Violet Rae Waldrun.)

them and we knew of this young man's character and we knew the people and we were very much interested in these people.

Q. Where do the Johnsons live with respect to where you live?      A. At the present time?

Q. Yes.      A. Out north of Pocatello.

Q. At any time subsequent to the accident did they live in your neighborhood? [104]

A. I don't know just where they lived at the time of the accident.

Q. After the accident, I asked about?

A. Oh, yes, yes, they did.

Q. Where with regard to where you live did they live at that time?

A. Just one block from us.

Q. Tell the Court and jury whether or not after Mr. Johnson was out of the hospital in the spring of 1951, whether or not you had occasion to visit the home of the Johnsons?

A. Yes, I visited Mr. Johnson after he came from the hospital.

Q. And did you go there on various occasions?

A. I did.

Q. On the occasions that you went to the Johnson home did you see Mr. Johnson?

A. I did see him.

Q. Tell the Court and jury what you observed with regard to Mr. Johnson on those occasions,—after he was out of the hospital and into the summer of 1951?

A. I observed that Mr. Johnson seemed to be

(Testimony of Violet Rae Waldrun.)

confused over his condition. We didn't care to talk to him too much about it. He talked very very lovely and he would answer our questions but in bringing up anything as to his condition we didn't do that because in our estimation he didn't seem to want to talk about it. If I may explain [105] one incident, my husband is a salesman and he made the remark that under the conditions——

The Court: Not what your husband said, you are not permitted to state that.

Q. Just describe Mr. Johnson's appearance on those occasions?

Mr. Casterlin: I think I will object to that question on the ground that his appearance would have nothing to do with this case after March 20, 1951.

The Court: I took it that this testimony was concerning matters in the spring of 1951 before March 20th.

Mr. Racine: That is my understanding.

The Court: Because we are still trying out the matters of right to bring this suit. You may testify as to matters in the spring prior to March 20, 1951.

Q. When he first came out of the hospital, will you describe his appearance?

A. The first time we visited Mr. Johnson, to me it was pathetic. He didn't seem like he had too much in the future, he didn't look happy to me. We didn't talk to him or force him to talk, we just commented as to how grateful we were to see him.

Mr. Casterlin: I think I will object to this as not being responsive. [106]

(Testimony of Violet Rae Waldrun.)

Mr. Racine: Just describe his personal appearance.

A. He had a confused look in his eyes.

Q. What was his face like?

A. The expression on his face wasn't good, it to me was an expression of wonderment as to what would be the outcome.

Mr. Casterlin: I think I will move to strike that as expressing an opinion as to what was in the mind of Mr. Johnson.

The Court: The motion will be denied.

Q. Will you state on the occasion of the first visit whether or not Mr. Johnson, in any conversation you had with him, talked or discussed matters with you rationally?

A. I cannot answer that exactly but I can say to this extent that we didn't discuss anything with him, we didn't talk to him much because we felt that he didn't care to talk about it and we could see that he didn't care to talk to us.

Q. Did he offer to talk to you?

A. No, he didn't.

Mr. Racine: You may inquire.

### Cross Examination

Q. (By Mr. Casterlin): Do you know when Mr. Johnson left the hospital?

A. I know he left for Christmas Day, we were there before [107] Christmas and he left to come home for Christmas Day.

Q. On this occasion or occasions that you were

(Testimony of Violet Rae Waldrun.)

visiting with him, I assume they were shortly after Christmas?

A. No, we were there before Christmas at the hospital.

Q. Now, when he was at home do you recall when he came home?

A. No, only for Christmas.

Mr. Racine: I wonder if the witness isn't confused about the question.

Q. Now, Mrs. Waldrun, what do you mean by coming from the hospital, do you have reference to this time he came home for Christmas Day?

A. No, the only thing I know,—I didn't keep track of when he came home, I knew he was home for Christmas and went right back.

Q. Do you know when he was discharged from the hospital and didn't have to go back?

A. No, I don't.

Q. Could you fix any date that you were there and had a talk with him?

A. No, sir.

Q. You don't know whether it was before March 20, 1951, or after?

A. I know that it was in March, in the spring.

Q. Was it the latter part of March?

A. Before the 15th or through there. I cannot say exactly [108] the date but I know it was after he came home in March.

Q. Isn't it a fact that you didn't care to discuss his accident to renew his memories? Isn't that the reason that you refused to talk to him?

A. No.

(Testimony of Violet Rae Waldrun.)

Q. Isn't it a fact that everybody that was there with him avoided the subject of his having lost his arm and his legs?

A. It might have been, we didn't do that.

Q. You didn't talk to him about that?

A. No, we didn't.

Q. That was one of the things that you avoided?

A. We didn't discuss the conditions with him.

Q. What did you talk about with him?

A. We talked about the fine weather we were having and how nice it was for him to be back again so that he could go to church and enjoy life.

Q. He understood what you were talking about?

A. I don't think that he did, if he did he didn't show it.

Q. Did he join in the conversation?

A. Not too much.

Q. Did he ask any questions?      A. No.

Q. Mrs. Waldrun, you have stated that you were interested in the Johnsons. I assume that you are interested in the outcome [109] of this lawsuit?

A. I certainly am.

Q. And you would certainly like to see Mr. Johnson prevail and win out?

A. I certainly would.

Mr. Casterlin: That is all.

### Redirect Examination

Q. (By Mr. Racine): What you have testified and stated here, are they the facts, what you knew about?      A. Will you state that question again?

(Testimony of Violet Rae Waldrun.)

Q. You have testified here as to facts that you knew, is that right?

A. They are facts that I knew.

Mr. Racine: That is all.

Mr. Casterlin: That is all.

### H. P. STEARM

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

#### Direct Examination

Q. (By Mr. Racine): Where do you reside?

A. 722 West Cedar, Pocatello, Idaho.

Q. What is your profession?

A. Associate professor of Political Science at the Idaho State [110] College.

Q. When did you first become acquainted with LaVerl Johnson?

A. About the first part of June, 1951.

Q. What were the circumstances under which you first became acquainted with Mr. Johnson?

A. He entered my classes at college. He came in as a pre-legal major.

Q. Did you have occasion to observe Mr. Johnson in classes?      A. Yes, sir.

Q. What did you observe about him at that time?

A. He enrolled in summer school and he was pushed into the classroom by students there. During the time that we were having lectures or dis-

(Testimony of H. P. Stearm.)

cussions he was ill at ease and perspiration continually poured down his face.

Q. What is the fact as to whether he participated in classes?

A. He did not participate in classes.

Q. What is the fact as to whether he took any examination?

A. The first examination we gave about two weeks after he enrolled in the class, after the semester started. As I gave out the questions I noticed that he was again in that very high emotional state, perspiring freely. When I gave the questions out I watched Mr. Johnson very closely, I anticipated that he might have trouble. About ten minutes after the class started,—after the test started Mr. Johnson threw his pencil down on the floor and was very [111] flushed in the face. I walked over and pushed his wheel chair outside the door and I started talking to him.

Q. Mr. Stearm, what is your educational background?

A. I have attended the Kansas State Teachers College at Emporia, Kansas. I also attended the Kansas University, University of Texas and the University of Utah.

Q. What degrees do you hold?

A. I have an A.B. and an M.S. and I am completing work on my P.H.D.

Q. Have you had any training or practical work in psychiatry?

A. Somewhat,—during my term in the Armed

(Testimony of H. P. Stearm.)

Forces, I acted under the supervision of the head psychiatrist and clinic psychologist in the hospital center, I acted as rehabilitation man under their direction.

Q. Where was that?

A. That was at Soissons, France.

Q. And when was it?

A. In World War Two.

Q. During what period of time?

A. That must have been approximately one year. I had training in rehabilitation before I went overseas.

Q. What type of patients were there in that hospital?

A. Extreme surgical cases,—amputees,—mental cases and so on.

Q. What was the nature of your work with those patients? [112]

A. My job as rehabilitation man and also as information man, as the patient was able, through doctors' orders we would give certain type of exercises and care, such as seeing that they got to the movies, books to read and discussions with them, and so on.

Q. Did you have occasion to observe the mental attitude of amputees at that time?

A. Yes, sir, very much.

Q. I will ask you now, Mr. Stearm, based upon your experience and upon your work with other amputees, what you have to say as to the compe-

(Testimony of H. P. Stearm.)

tency of Mr. LaVerl Johnson when you first met him in the summer of 1951?

Mr. Anderson: I think we will object to that, if the Court please, we do not think this witness is qualified to answer. I think this is a medical question.

The Court: He may answer.

A. I was about to ask what the attorney meant by competency.

Q. Just what you observed, what you saw, and as to whether you felt that LaVerl Johnson was able to carry on and transact his business in the normal activities of conducting his own affairs?

A. I would say definitely not.

Q. Will you explain what you observed, as a basis for your opinion? [113]

A. As I mentioned before, when he threw down his pencil, he was very or seemed to be very emotionally upset. I pushed him out into the hallway. In our training in the Armed Services we were told definitely never to show any sympathy toward anyone injured or anyone who had amputations. So with the experience I had had with people like that, I took Mr. Johnson out in the hallway and I gave him a very sound going over. Meaning by that, I didn't give him much of a chance to show any sign of asking for sympathy or feeling sorry for himself. I told him that he was making a very sorry spectacle of himself in acting the way he did in the classroom. I spoke to him for about an hour and a half at that time and in doing so I never let

(Testimony of H. P. Stearm.)

him get a chance to say too much. After about 30 minutes I let him talk to me a little. In reference to that, he told me that he had threatened himself a number of times and that he felt at that time that he was of no value to anyone in this world and that he would like to end it all right now. I made fun of him and I said,—

Mr. Casterlin: —I think we object to the testimony of this witness as a whole and move to strike it on the ground that mental competency is determined as of a time prior to March 20, 1951, and this applies to a period after that.

The Court: If he was in that condition [114] after that time it certainly shows that he had not recovered.

Mr. Casterlin: It would not make any difference whether he had recovered or had not recovered because the suit then would have been brought in time and it would not be material here.

The Court: The objection will be overruled.

Q. You may go ahead, Mr. Stearm?

A. I told him that life was a pretty sweet thing and that the only person he would really be hurting if he tried to end it all as he had threatened, would be his family and his friends. He began to talk more freely with me but at the time he talked very haltingly. As he would speak he would start to say something, stop and rephrase his statement and start over again in a very halting manner. Of course, I tried to make him feel better without showing any sympathy and I think in about an hour

(Testimony of H. P. Stearm.)

and a half he was in a pretty good shape mentally at that time.

Q. Mr. Stearm, did you see him from time to time after that circumstance and occasion that you have related?

A. Yes, since he is a major of mine I have been in close contact with him and also since the condition he was in I have taken a very special interest in his case and worked with him at all times. By all times I mean from [115] day to day over a period of the past two years.

Q. To your knowledge have there been any other occasions that you have had occasion to observe him as to his competency?

Mr. Casterlin: I renew my objection as to this being immaterial. He has established one instance after March 20th and any other instance would be immaterial, after that date particularly.

The Court: The only question we are dwelling on here is whether he should have been barred from having this case heard on account of his condition and on account of the statute of limitation running on March 20, 1951, I believe was the date, without making any further statement I think I will let you go ahead because any condition after March 20th would certainly show that he must have been worse prior to that date. You may answer that last question yes or no.

A. Yes.

Q. Do you have the times in mind?

A. The approximate times, yes, sir.

(Testimony of H. P. Stearm.)

Q. Will you state them?

A. One was a year ago last summer and again last fall.

Q. Will you relate those circumstances?

Mr. Casterlin: I will renew my objection at this time. This case was brought within two years after March 20, 1951, consequently any continuation would [116] be immaterial as to the question of the statute of limitation because the suit was then brought in time and any condition existing on March 20, 1951, would be immaterial.

The Court: I cannot agree with you. I realize the statute of limitation started to run on March 20th and any condition that this man has after that would necessarily, it seems to me, show that his condition prior to that time wasn't much better. I don't want to make any comment, this is for the jury to say as to whether this man should be excused from taking care of his business for the first few months after his injury. I don't want the jury to take any suggestions that they think I might make in regard to this. They have the facts and they know his condition. I think this witness and other witnesses should be allowed to testify to it,—most of it certainly can be observed.

Mr. Casterlin: I object also that it is too remote from March 20th.

The Court: I realize that it is somewhat remote but he may answer.

A. The first occasion was during the summer-time a year ago,—a year ago this past summer, I

(Testimony of H. P. Stearm.)

took LaVerl with me fishing. During this trip as he went to bed that night he took a pistol out of his car and placed it under his pillow,— [117] actually it was under his coat that he had out there. I asked LaVerl the purpose of the pistol,—was it to protect himself in case of bears or what. We talked quite a bit around the camp fire and I believe it was at that time that he told me that he used the pistol in case that he should get himself injured or in any way was not able to take care of himself that he would shoot himself,—that he had carried this pistol ever since he was able to get about, for that purpose. At that time he mentioned that he had several times got on his horse to go in the hills with the idea of shooting himself,—shooting his horse first and shooting himself after he killed his horse. The next occasion was in either the late fall or early winter of last year. If the date is important I could look it up. We took a group of students to the University of Utah to hear a speaker at the Pi Sigma Alpha annual dinner. Mr. Johnson and his wife were both there at that time. Mr. Johnson came to me in rather an embarrassed way and asked if I would go with him; he seemed rather disturbed about something. I went into the rest room with him and at that time Mr. Johnson said, “I am not very much good for anything.” He said, “I wish you would help me.” And I said, “What is the matter, LaVerl?” And he said, “I can’t wash my hand and we are going in to lunch.” And I said, “Certainly, I will be glad to wash your

(Testimony of H. P. Stearm.)

hand for you." [118] Before the group was around I scrubbed his hand so that he could go in to dinner and eat. So far as any definite threat is concerned, he didn't make any at that time. He just suggested or said that he would be better off dead.

Mr. Racine: I think you may inquire.

### Cross Examination

Q. (By Mr. Casterlin): Mr. Stearm, in the course of your work I assume this is not the only instance where you have seen students that were ill at ease and were perspiring when they were posed for an examination?

A. Most of them are ill at ease but they don't perspire as profusely as Mr. Johnson did.

Q. Where did you get your M.S.?

A. It was a M.A.

Q. I thought you said M.S., pardon me.

A. Well, I may have but that was an error, it was a M.A.

Q. Where did you get that degree?

A. At the Oklahoma A. & M.

Q. Did you get that as a result of seminar or a written examination?

A. I got my M.A. both by,—well, we take the seminar, that is a course that we take for written work.

Q. Yes, I have an M.A. also and I was just wondering if you had the same experience that I did. Now, did you get your [119] M.A. as a result

(Testimony of H. P. Stearm.)

of an open examination in seminar or as a result of a written examination?

A. I took a written examination covering four fields of Political Science and then took an oral examination over my master's thesis before a board of five members.

Q. And I presume you were not ill at ease or nervous when you went before all of these professors and students for the oral examination?

A. No, not the oral examination because I had written on a subject that possibly few people knew much about and I figured that I knew more about that subject than the professors did.

Q. That is an unusual situation. Would you say, Mr. Stearm, that because a person is ill at ease under certain circumstances that he is mentally incompetent to transact his own affairs within his own sphere of activity?     A. No, sir.

Q. Would you say that because a person perspires that he is incapacitated to transact his own business within his own sphere of activity?

A. No, sir, but may I explain that?

Q. Yes, you may.

A. In a case of people who have amputations I have observed that they do in emotional states perspire more profusely than persons who have not had amputations. [120]

Q. Isn't it a fact any person, whether he is an amputee or not, perspires in the event of an emotional upset?     A. I would imagine so, sir.

Q. When you speak of the emotional upsets that

(Testimony of H. P. Stearm.)

Mr. Johnson has had; you mentioned one that occurred when he took his first examination in 1951, now, there was a complete recovery from that, was there not?        A. In what way do you mean?

Q. You said that you took him out and talked to him and let me ask if he recovered from that emotional upset then?        A. Yes, sir.

Q. And then you testified that he had another one along in the summer of 1952; he recovered from that emotional upset, didn't he?        A. Yes, sir.

Q. After his recovery from that emotional upset you would not say that he was mentally incompetent to transact his own business within the sphere of his own activity, would you?

A. I think that I would not be in a position to say whether he was or was not.

Q. Now, last fall, that would be the fall of 1952 or 1953?        A. 1952 is what I referred to.

Q. There was nothing about his asking you to wash his hands which would indicate to you that he was mentally incompetent [121] to perform his own business, to transact his own business within the sphere of his activity, was there?

A. Well, in answering that question, his business at that particular time was washing his hand and he could not do that.

Q. You understand what I have in mind, Mr. Stearm, if he had other spheres of activity within his own life, the fact that he had to have help in washing his hand, that would not drive you to the conclusion that he was mentally incompetent?

(Testimony of H. P. Stearm.)

A. No, the statement that he made at the time is what I referred to, he stated at the time that he would be better off and everyone else would be better off if he was dead or something to that effect.

Q. Have you ever heard people who are not amputees make the same statement in instances of emotional upsets?     A. I imagine so.

Q. The fact that they make that statement; when they recover from the emotional shock, they go back to their normal habit and action?

A. Yes, I guess they do, to their normal action.

Q. It is not unusual for a person to carry a six-shooter in the hills in order to relieve themselves of being caught where they cannot get loose,—that is common practice among hill men, isn't it?

A. I cannot answer that, I know that I would not carry a [122] pistol just to shoot myself.

Q. In cases of extreme circumstances you know that hill people do carry six-shooters?

A. Yes, I know they do.

Q. Have you ever heard them say that they carried them in the event that they slipped on a rock and broke their leg they would not have to lie there and suffer?

A. No, sir, I never have.

Q. You never have heard that?     A. No, sir.

Q. You would not say that if a person made that statement that he was not competent to transact his business if he was a farmer on a farm, would you?

A. I think the question of whether a man is

(Testimony of H. P. Stearm.)

mentally incompetent or not is not within my sphere to answer over a period of years; at the time that I am speaking of he was definitely emotionally upset.

Q. You would not say that because of the three instances of emotional upset that Mr. Johnson was mentally incompetent to transact the business in which he was engaged in his own sphere, his own normal average daily life?

A. No, not from those alone but from knowing Mr. Johnson for the time that I have known him and observing him on the occasions and observing his actions up to that time I would say that he was definitely incompetent at that [123] time.

Q. At that particular time? A. Yes, sir.

Q. You have stated that you have a special interest in his case, I assume that is correct?

A. Yes, sir.

Q. You have that interest so that you would really like to see him win in this case?

A. You are misinterpreting my words; in referring to his case I was referring to him as a student at the Idaho State College.

Q. I see, but as a matter of fact you would like to see him win this lawsuit?

A. Only if he is meeting the requirements of the law.

Mr. Casterlin: Thank you, that clears that up. I believe that is all.

Mr. Racine: That is all.

LAVERL JOHNSON

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Racine): Your full name is LaVerl A. Johnson?             A. Yes, sir.

Q. Have you ever been a witness on a witness stand before? [124]             A. No.

Q. Then, Mr. Johnson, will you speak up as best you can and address your remarks to the jury. Where do you live?

A. I live at 168 Jones Drive, Pocatello.

Q. Where did you live on or about November 4, 1950?

A. I lived at 38 Orchard Drive, Pocatello, Idaho.

Q. Where were you employed on that date?

A. I was employed at the Pacific Fruit Express Company.

Q. Was that here in Pocatello?             A. Yes.

Q. What was your age on November 4, 1950?

A. I was 23.

Q. Were you married then?             A. Yes.

Q. To whom?             A. To Joleen.

Q. How long had you been employed at the Pacific Fruit Express prior to November 4, 1950?

A. I am not certain of the dates but I would say that it was approximately two years over-all.

Q. Approximately two years, you say?

A. Yes.

(Testimony of LaVerl Johnson.)

Q. What was the nature of your employment or work at that time?

A. At that immediate time?

Q. What were your general duties on that day and prior to [125] that day?

A. I was a repairman for the Pacific Fruit Express Company.

Q. And as a repairman state briefly what you did?

A. Well, we repaired almost anything of a minor nature that would become unserviceable.

Q. Were you an electrician then?

A. No, I wasn't.

Q. Did you have any knowledge of electricity?

A. Very little.

Q. Had you ever worked around high voltage electricity? A. No.

Q. What happened that day, LaVerl, as to any of the electrical power at the Pacific Fruit Express Company?

A. Well, the electricity was turned off at the plant.

Q. What is the fact as to whether or not you saw anyone around there working on the electrical equipment? A. Yes, sir, I did.

Q. Who did you see, if you know?

A. I don't know who it was, but it was someone foreign to the Pacific Fruit Express employees right there.

Q. To your knowledge were there any electri-

(Testimony of LaVerl Johnson.)

cians at the Pacific Fruit Express plant on November 4, or prior to that time?

A. Well, not any Pacific Fruit Express employees.

Q. There were no electricians? [126]

A. Not Pacific Fruit Express employees, no.

Q. Had you ever had occasion to observe men working on the electrical apparatus prior to November 4, 1950, around the plant?

A. I have seen men work with electricity around there but I didn't know who they were, they were not employees from our company there.

Q. What did you do that day, on November 4, 1950, so far as the electrical equipment was concerned and why did you do it?

A. Well, I was instructed to paint those electric cables that go into the transformers, by Mr. Johnson, I had been painting them most of the morning on one particular transformer cage until it satisfied him as being a complete job on that particular cage——

Q. ——Will you speak just a little louder, LaVerl?

A. Yes, and about noon Mr. Johnson came along and gave me the keys to this other transformer cage and I was instructed to paint it as I had painted the other one. Paint all the bare wires, re-dress them.

Q. What were you told as to whether the power was off or on?

A. I was told, by Mr. Johnson, that this was

(Testimony of LaVerl Johnson.)

the only day we would have the power off and that the power was off.

Q. Where did you see other men working on the electrical equipment around there that day?

A. My first observation was that he was inside of this transformer cage and they had one of them open. Later on in the afternoon or that morning I saw them in the other transformer cage looking into another one.

Q. And what is the fact as to whether or not you at any time saw this man whom you didn't recognize as a Pacific Fruit Express Company man, working around in the place where you were injured?

A. Yes, I had observed him working in there; he was in the cage working that morning while I was in the other one.

Q. Who did you call, prior to November 4, 1950, —you and the other workmen whenever there were power failures?

A. Well, in case of any power failure there was a number for us to call. It was for the Union Pacific Substation there, and there would be someone there to find out what the trouble was.

Q. Where was that number located, was it posted somewhere?

A. Yes, it was posted near the telephone.

Q. And where was that?

A. That was inside one of the engine rooms.

Q. In the engine room at the Pacific Fruit Express plant?

A. Yes, in the engine room.

(Testimony of LaVerl Johnson.)

Q. Now, LaVerl, just tell the Court and jury what you did on that day, November 4, 1950, so far as you remember just before you were injured?

A. Just prior to going to lunch Mr. Johnson instructed me to,—after he gave me the keys he instructed me to go into this cage and paint it as I had painted the other; then I went to lunch. After I came back from lunch I mixed my paints and the stuff that I was to put on the wires and I proceeded to enter the cage and I walked around to work from the back side to the front so that I would not be rubbing paint on me all of the time. Upon going to paint the first wire I got hold of this one that had never been de-energized.

Q. And what do you next remember?

A. Well, I remember being in the hospital.

Q. Do you know how long you were in the hospital?

A. Well, I was in the hospital until either February or March of the following year.

The Court: At this time we will adjourn until 10 o'clock tomorrow morning.

November 20, 1953, 10:00 o'clock a.m.

Mr. Casterlin: At this time, if the Court please, the defendant waives its defense of the statute of limitations and asks that all of the allegations alleging the statute of limitations being stricken from its answer, which is the second defense in the answer, and also moves at this time, in view of that motion, that all of the exhibits from 1 to 13 be

stricken as [129] they pertain solely and only to the defense of the statute of limitation. In this connection I wish to assure the Court that this motion comes at the very first opportunity that we have had to observe the hospital records for anything concerning the handling of this case in the hospital through the doctors or otherwise, because this is confidential and we could not obtain the records had we sought to do so, and after examining the records we decided to take this move. Having now examined and investigated the records which we did not have an opportunity to see before, we make this motion. I assure the Court that this defense was made originally in good faith for want of information and we ask now that the Court instruct the jury appropriately with respect to this defense, in respect to the evidence and the testimony offered that they are not to consider it further in connection with this case as to the plea of incompetency or representation; that the case now has assumed one strictly of negligence under the allegations in the complaint. \* \* \* \* [130]

The Court: Ladies and gentlemen of the jury, I think you understand just as fully as the Court will be able to explain it to you that the defendant, Union Pacific Railroad Company, has withdrawn its defense of the statute of limitation. In other words, they have consented that the plaintiff had the right to sue regardless of the statute of limitation which provides that an action must be filed within two years,—so that leaves you in the position of determining what part of the evidence which you

have heard here for the last two days pertains to the statute of limitation and what part pertains to the question of humiliation and disability, pain and suffering of the plaintiff in this case. All of the testimony, the letters back and forth to the Industrial Accident Board; the conversations with the claim agents and examiners of the Union Pacific Railroad. In fact all of the exhibits that have been introduced here in evidence that pertain to the ability of Mr. Johnson to figure out his business affairs to the extent that he would have been able properly handle his affairs in regard to his accident so that he could have filed his suit within the time limited by statute,—all of that testimony is not material now in view of the position taken by the Railroad Company to withdraw this defense. It is the duty of the jury to eliminate that evidence from their minds. [131] I want to make it clear,—this does not strike the testimony so far as it pertains to Mr. Johnson's condition, such as his disability, pain, suffering, humiliation and things of that kind.

I am going to strike all of the exhibits except those pertaining to the hospital records; that is,—they will not be admitted for any purpose except to show the length of time that he was in the hospital and the treatment that he received at that time. It may be necessary later in this case for me to give you further instructions in regard to those exhibits but they are so cumbersome that the Court will have to go through them and determine what will be eliminated. In fact I would eliminate all of them at this time except that it might place the plaintiff

in the position of having to return some the nurses and some other witnesses to testify in regard to some parts of those records.

Because of the turn that this case has taken, I am going to permit the plaintiff to put on one additional witness today because his business affairs are such that he must or should get away, and then I will recess this case until Monday morning.

I don't want any of the jurors to worry about Thanksgiving because we will recess or adjourn for Thanksgiving Day if we have not finished by that time. [132]

Now, do you gentlemen feel that I have covered the matter sufficiently?

Mr. Racine: Yes, we do.

Mr. Casterlin: Yes, your Honor.

The Court: And the record may show that Mr. Johnson is withdrawn from the witness stand at this time.

#### IRVING J. ESKELSEN

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

#### Direct Examination

Q. (By Mr. Phillips): Your name is Irving J. Eskelsen? A. Yes, sir.

Q. Where do you reside, Mr. Eskelsen?

A. 625 West Halliday, here in Pocatello.

Q. What is your occupation?

A. Electrical foreman for the Union Pacific at Pocatello.

(Testimony of Irving J. Eskelsen.)

Q. That is in the Union Pacific Railroad shops in Pocatello?      A. Yes, sir.

Q. How long have you been in that position?

A. Approximately seven years.

Q. During that time you have read meters measuring the delivery of electricity by the Union Pacific to the [133] Pacific Fruit Express Company here in Pocatello?      A. That is right.

Q. That is done at least once each month?

A. Yes, once each month.

Q. Where is the meter at the Pacific Fruit Express Company ice plant in Pocatello located?

A. It is in the inclosure of what we call twelve point five substation.

Q. With respect to the Pacific Fruit Express Company ice plant, what direction from that plant would that be?

A. I would say that it was south.

Q. In a southerly direction?      A. Yes.

Q. Who, if anyone, goes into the substation with you when you read the meters?

A. An employee of the Pacific Fruit Express Company.

Q. Will you state, if you know, who those persons are?

A. They are various persons. Mr. Shoup has been one, and Mr. Johnson and one of the assistant plant engineers whose name I don't recall.

Q. They go in with you each month to read the meters?      A. Yes, sir.

Q. Are they electricians?

(Testimony of Irving J. Eskelsen.)

A. I really cannot answer that question,—I don't know their qualifications.

Q. You never made any inquiry as to their qualifications? [134] A. No, sir.

Mr. Phillips: That is all.

### Cross Examination

Q. (By Mr. Anderson): Is that all of the functions that you perform, reading the meters in that substation? A. Yes, sir.

Q. And that is for the purpose of determining the amount of electrical energy delivered?

A. Yes, sir.

Q. The line that delivers energy to that substation comes across the track?

Mr. Phillips: We object to that as improper cross examination and not within the scope of the direct examination.

The Court: The objection is sustained.

Q. Do you have a key to that substation?

A. No, sir.

Mr. Phillips: We object to that on the same ground, that it is not proper cross examination and it is not within the scope of our direct examination.

The Court: I guess that is doesn't make any difference whether he has a key or not, I will let the answer stand.

Q. You do have to get someone from the Pacific Fruit Express [135] to unlock the gate to let you in? A. Yes.

\* \* \* \* \*

The Court: Very well, however, I would like it understood that if they are to be called that we do not have to wait on them. I am sorry to do this, ladies and gentlemen of the jury, but I think that we can finish this case within three days starting Monday [136] morning, so the Court will adjourn at this time until Monday morning at ten o'clock. I want to again remind you as I did at the onset of this trial, you are not to discuss this matter among yourselves or with anyone else or to permit anyone to discuss it in your presence. If anyone does mention this case you will politely and quietly tell them that you are a member of the jury and that they should not discuss it in your presence. If they say anything further you will report them to the Court. I want to also admonish everyone, witnesses and others connected with this case, that they should not embarrass the jury by discussing the matter in their presence. We will adjourn until ten o'clock Monday morning.

November 23, 1953, 10:00 o'clock a.m.

TONY TOFENELLI

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Racine): Your name is Tony Tofenelli?            A. Yes, sir.

Q. Where do you reside, Mr. Tofenelli?

A. 904 West Young. [137]

(Testimony of Tony Tofenelli.)

Q. Where were you residing November 4, 1950?

A. At the same place.

Q. What was your position or occupation on that date?      A. I was an iceman.

Q. For whom were you employed?

A. The Pacific Fruit Express.

Q. Here in Pocatello?      A. Yes.

Q. For what period of time were you employed in that position?

A. Six years I worked for them.

Q. Have you ever been a witness before?

A. No.

Q. Well, now, I will ask you to speak up loud enough so that the Court, the jury and all of us can hear you. What is the fact, Mr. Tofenelli, during the time that you were employed at the Pacific Fruit Express ice plant as to whether or not there were electricians employed at that place, to your knowledge?

A. To my knowledge there wasn't.

Q. To your knowledge who did the electrical work there at the plant,—during the time that you were employed there?

A. The Union Pacific Railroad electricians did their electrical work.

Q. And what is the fact as to whether or not you have seen such individuals around the plant?

A. I have seen them around there, yes, sir.

Q. What was the fact as to your instructions as an employee out there, regarding electrical difficulties?

(Testimony of Tony Tofenelli.)

A. At any time anything went wrong we were supposed to call,—we would go to the engine room and there there was a telephone number that we were supposed to call.

Q. And who was it that you called?

A. It was the railroad.

Q. Have you been at the plant prior to November 4, 1950, when any Union Pacific electricians were present?     A. Yes, sir.

Q. Will you state the circumstances as you recall them?

A. There have been a few times that I was in this place,—

Q. —What place are you referring to?

A. Where the transformers are.

Q. Where the transformers are?

A. In this cage where the transformers are.

Q. And where is that?

A. At the Pacific Fruit Express.

Q. Where from where the ice plant is?

A. Next to the ice plant.

Q. Is it south of the ice plant?     A. Yes.

Q. It is in a separate enclosure?

A. Yes. [139]

Mr. Racine: I would like to have these exhibits marked and I will ask the clerk what numbers they have.

The Clerk: 14 to 17.

Mr. Racine: We desire at this time to introduce in evidence Exhibits Numbered 14 to 17, being photos previously furnished to us by the defend-

(Testimony of Tony Tofenelli.)

ant,—they are enlargements of photos furnished to us.

The Court: Is there any objection to these exhibits?

Mr. Anderson: We have no objection except that they have taken out Plaintiffs' Exhibit No. 15.

Mr. Racine: That was simply a duplicate.

The Court: The others, 14, 16 and 17 may be admitted.

Q. Mr. Tofenelli, you have been handed what are marked as Plaintiffs' Exhibits 14, 16 and 17. I will ask you whether or not, to your knowledge, those photos and exhibits fairly illustrate this sub-station of which you have spoken?

A. Yes, sir, they do.

Q. And what is the fact as to whether or not you have personally been inside of that sub-station?

A. I have been in there.

Q. Will you relate to the Court and jury what the circumstances were under which you have been in that sub-station? [140]

Mr. Anderson: We object to that as immaterial.

The Court: Well, I cannot tell at this point, I will let him answer.

A. I have been in this sub-station to cut weeds and to spread gravel and to do a few other things.

Q. Who have you been in the sub-station with?

A. I have been in there with Mr. H. O. Johnson, Mr. Shoup, and Mr. Jim Johnson.

Q. Have you been in there with any other person?

(Testimony of Tony Tofenelli.)

A. Yes, I was there when there was an electrician in there.

Q. Will you talk a little louder, Mr. Tofenelli, I couldn't hear you?

Mr. Anderson: I again object, that it is incompetent, irrelevant and immaterial and doesn't run to any issue in this case and does not pertain to the plaintiff, Mr. Johnson.

The Court: I cannot tell what his answer is going to be, I will let him answer.

Mr. Racine: I am not sure whether the question was answered or not, Mr. Reporter, will you read the last question and if there was an answer will you read it.

(Question and answer read by reporter.)

Q. And do you know by whom the electrician was employed?      A. By the U.P. [141]

Q. Did you observe any Union Pacific trucks around the sub-station from time to time?

A. Yes, sir, I have.

Q. And what is the fact as to whether or not the trucks were connected with the electricians that you observed there?

A. On the side of the truck they had Union Pacific Railroad Maintenance of Way and from that I took it that they were Union Pacific trucks.

Mr. Anderson: I move to strike the last portion as to what he took them to be.

The Court: Yes, that may be stricken, the jury will decide that.

Q. And what is the fact as to whether or not

(Testimony of Tony Tofenelli.)

the electricians, the Union Pacific employees, came in the trucks or truck that you spoke of?

A. Yes, I think they did.

Mr. Racine: You may examine.

### Cross Examination

Q. (By Mr. Anderson): What were your duties, Mr. Tofenelli, out at the Pacific Fruit Express? A. I was an iceman.

Q. By iceman what do you mean, what did you do? A. I iced the cars.

Q. You were up on the dock and put ice in refrigerator cars? [142] A. That is right.

Q. And is that where you spent most of your time, up on the ice dock?

A. Yes, the biggest part of it.

Q. What did you do when you were not up there working on the ice dock, do you do anything at those times?

A. Generally cut weeds.

Q. On the Pacific Fruit Express property?

A. Yes, sir.

Q. You worked for the Pacific Fruit Express Company? A. Yes, sir.

Q. And you didn't work for the Railroad Company, did you? A. No, sir.

Q. When was it when you saw some railroad electricians doing some work there?

A. I cannot tell the date.

Q. But you are speaking about a time prior to November 4, 1950, aren't you, in your testimony?

(Testimony of Tony Tofenelli.)

A. Yes, sir.

Q. About when was it?

A. Well, I have seen there off and on, they come in and drain the oil out of these condensers and put new oil in them.

Q. When was that, can you tell?

A. No, I cannot.

Q. How do you know that they were Union Pacific electricians? [143]

A. Just by the truck.

Q. Just by the truck?                    A. Yes, sir.

Q. Now, about those instructions; did you ever call any electricians over there yourself?

A. No, sir.

Q. You had nothing to do with that?

A. No, sir.

Q. But you do know that they did not come unless they were called, don't you?

A. Well, no, I don't.

Q. You don't know about that?

A. No, I do not.

Q. Do you have any information at all as to what the arrangement is as to any electricians doing work for the Pacific Fruit Express?

A. No, sir, I don't.

Q. How did you get into the sub-station whenever you went in there?

A. There is a gate there and it is usually locked.

Q. Did somebody furnish you a key or did they open it for you?

A. They opened it for us.

(Testimony of Tony Tofenelli.)

Q. And would that be Mr. H. O. Johnson or Mr. Shoup? A. Yes, sir.

Q. And when you left there was it locked again?

A. Yes, generally.

Q. You stated that you were in there with an electrician, a Union Pacific electrician, who was that, can you tell me?

A. No, I don't know the fellow, we was in there cutting weeds one day when they came in.

Q. And what did they do?

A. Well, like I said before, they took the top off this transformer and they filled it up with oil. I believe they took the old oil out and put new oil in.

Q. About when was that, can you tell me?

A. I have seen them do it off and on but I cannot tell the dates.

Q. Off and on what,—off and on over a period of six years? A. Yes.

Q. Mr. H. O. Johnson, Mr. Shoup and Jim Johnson, they were all officers or employees of the Pacific Fruit Express Company? A. Yes.

Q. And I think Mr. H. O. Johnson is since deceased, do you know that? A. Yes, sir.

Q. This sub-station is enclosed with a high wire fence? A. Yes, sir.

Q. And it sets out in the open so that anybody can come around it whether they are railroad employees or Pacific Fruit [145] Express Company employees?

(Testimony of Tony Tofenelli.)

A. They can come around it but they cannot get inside of it.

Q. What is the dimension of that, do you know?

A. No.

Q. Would it be about 30 feet square, would you say?

A. It could be that, yes.

\* \* \* \* \*

### MELIO TOFENELLI

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

#### Direct Examination

Q. (By Mr. Racine): Will you state your full name?

A. Melio Tofenelli.

Q. And have you ever been a witness before?

A. No, sir.

Q. Then I will ask you to speak up and direct your remarks to the jury, if you will.

A. Yes, sir.

Q. Where are you employed at this time?

A. For the City of Pocatello. [146]

Q. Where do you live?

A. 635 West Sublet.

Q. Where were you employed on and before November 4, 1950?

A. At the Pacific Fruit Express Company ice plant, Pocatello.

Q. For what period of time were you employed there?

A. Two years.

Q. What was your work there?

A. Iceman.

(Testimony of Melio Tofenelli.)

Q. Your brother was working there as well at that time?      A. Yes, sir.

Q. And is your brother employed by the city now?      A. Yes, sir.

Q. Were you working at the ice plant on November 4, 1950?      A. Yes.

Q. What is the fact, to your knowledge, as to whether there were electricians working at the Pacific Express plant on November 4, 1950, or prior to or on November 4, 1950?

A. There was none.

Q. There were no electricians working for the Pacific Fruit Express?      A. None.

Q. What is the fact as to who did the electrical work around the ice plant prior to November 4, 1950?

A. It would be the Union Pacific.

Q. Had you seen such men at the plant working? [147]      A. Yes.

Q. How frequently?

A. Sometimes once a month and sometimes twice a month.

Q. Where did you see them working there?

A. Out in the cage where the transformers are located.

Q. Where is that located?

A. South of the ice plant.

Q. What is the fact as to whether or not the cage of which you spoke is in the enclosure which surrounds the ice plant itself?

A. In don't know just what you mean.

(Testimony of Melio Tofenelli.)

Q. Well, is it in a separate enclosure?

A. Yes.

Q. Where did you go to work on November 4, 1950?

A. I went to work at the ice plant.

Q. I meant to ask when did you go to work on that date?

A. I went about eight o'clock in the morning,—at eight o'clock.

Q. State whether or not you observed any men inside of the sub-station to which you refer here?

A. Yes.

Q. The sub-station just south of the ice plant?

A. Yes, when I punched in at eight o'clock in the morning I went through the lunch room, just a little place out east of the tracks. I was sitting there looking out and I seen [148] H. O. Johnson and another man there with a little pick-up truck working inside of the cage and the power was still on at that time, they were inside of the cage.

Q. Now, you mentioned a truck, will you describe that truck?

A. It was a small pick-up truck and it had U.P.R.R. Maintenance of Way on the side.

Q. Where was that with regard to the sub-station?

A. Parked along side of the sub-station.

Q. After you saw these men in there, what did you do, what were your duties?

A. We had to go up north of the tracks to pick

(Testimony of Melio Tofenelli.)

up the weeds and stuff like that, sticks and weeds and stuff like that.

Q. About when did you observe that the power was off?

A. Later on someone said that the power was off and that they was doing some work.

Q. Prior to November 4, 1950, Mr. Tofenelli, while you were working at the ice plant, what, if any, instructions did you have regarding electricity generally?

A. There is a place in the engine room right above the telephone, there is a number to call in case there was anything wrong.

Q. And what is that number?

A. 268, Extension something.

Q. Did you understand what place you would be calling?      A. No. [149]

Q. Do you know what Number 268 is?

A. It is the U.P. number.

Q. What was that answer?

A. It was the U.P. number.

Q. And by U.P. you mean Union Pacific Railroad Company?

A. Yes, sir, Union Pacific Railroad Company.

Q. Later that day, that is, in the afternoon did you have occasion to observe the sub-station further. Did you look at the sub-station later that afternoon?      A. Yes.

Q. Will you state to the Court and jury the circumstances as to that,—where you were located?

A. There was an H. F., what we call a train

(Testimony of Melio Tofenelli.)

coming on track one, it was a 30 per cent frozen food and we were getting ready to ice it. Just as it stopped I got on the deck of this 30 per cent icer, —the box car, I was getting ready to ice it and this was right direct across from me and I seen a bunch of smoke in this transformer cage.

Q. Now, just a moment,—how far is it from the dock where you were located over to this sub-station?     A. I would say about 75 yards.

Q. That is your best estimate?     A. Yes.

Q. All right, now proceed and tell just what you saw?

A. Our foreman was there and I asked him, what is that burning,— [150] it smelled similar to flesh burning and he glanced over there and then he runs up a couple of car lengths from where I was and he comes back running and hollered at me and said, “It is Johnson”. I don’t know which Johnson it was and so I follow him down the steps to the office and he went in and called someone, I didn’t know who he called. I went over to the transformer cage and there was LaVerl Johnson, he was unconscious, he wasn’t moving or anything, just laying there and his shoes was on fire, smoking.

Q. Where was he lying?

A. He was right there by the lightning reactors.

Q. Inside the cage?     A. Inside the cage.

Q. What did you do then?

A. There was nothing that I could do until we got some help.

(Testimony of Melio Tofenelli.)

Q. Did you know anything about the electricity or the electrical apparatus inside the sub-station?

A. No.

Q. What resulted after that, Mr. Tofenelli?

A. Right after that there was this little fire engine and the ambulance came, they raised the wire with an ice pick, what we use to break up the ice, and then they hooked him in the belt and drug him out of the cage.

Q. Who did that?

A. I think it was one of these firemen. [151]

Q. Prior to November 4, 1950, Mr. Tofenelli, had you at any time been inside the sub-station?

A. Yes.

Q. Will you state to the Court and jury what were the circumstances of that?

A. We was in there cutting weeds while there was this little Union Pacific Railroad pick-up there. They was changing the oil in these transformers, I think.

Q. What is the fact when you were inside the sub-station with the electricians, you had been given any instructions as to the equipment or the apparatus in there?

A. No, they never told us nothing about it.

Mr. Anderson: We move to strike that answer on the ground that it doesn't appear in the record who he is referring to when he said they got no instructions.

The Court: It may be stricken because it doesn't

(Testimony of Melio Tofenelli.)

amount to anything. He said that he had no instructions.

Q. Now, Mr. Tofenelli, after you observed the men in the sub-station on or about eight o'clock on November 4, 1950, did you see Mr. Johnson with this man or men later on that day?      A. Yes.

Q. Will you tell the Court and jury about that?

A. I saw him at least three or four times. I don't know where [152] he was going, whether he was going to the car department,—they have a little sub-station over there too, or whether he was going over there and back to this one at the P.F.E. ice plant.

Q. How was he traveling around?

A. In this little pick-up that had Union Pacific Maintenance on the side of it.

Q. Who was driving the pick-up?

A. This Union Pacific man.

Q. If you know, tell us whether on November 4, 1950, there was an inspection of this electrical equipment out there at the plant?

A. I don't think there was.

Q. Did you see this man at various places where there was electrical equipment around the plant on November 4, 1950?      A. Yes, sir.

Mr. Racine: That is all.

### Cross Examination

Q. (By Mr. Anderson): How did you know that these men were Union Pacific employees?

A. By their pick-up.

(Testimony of Melio Tofenelli.)

Q. That is the only way that you determined whether they were railroad employees or not?

A. Yes.

Q. Just by the pick-up truck? [153]

A. Yes, sir.

Q. How often did you go into the cage to cut weeds? A. I guess about three times.

Q. While you were working at the Pacific Fruit Express? A. Yes.

Q. How long did you work there?

A. About two years.

Q. Who else was in there with you when you went in to cut weeds?

A. H. O. Johnson and this Union Pacific man with the pick-up truck working on these transformers, they were changing the oil.

Q. Every time you cut weeds they changed the oil? A. Not necessarily.

Q. What is the fact, did they change the oil every time you cut the weeds? A. No.

Q. When did you see them change the oil in the transformers?

A. I can't name the date.

Q. Approximately,—prior to November 4?

A. I don't know what month it was,—I never kept track of the time.

Q. There was just the one time that you saw them?

A. I have seen that about three times in the period that I was there, about two years. [154]

(Testimony of Melio Tofenelli.)

Q. How did you get into this sub-station, who let you in?      A. Howard Johnson let us in.

Q. He was assistant plant manager of the Pacific Fruit Express?      A. Yes, sir.

Q. He didn't work for the railroad company?

A. No, sir.

Q. Is it your understanding that Mr. H. O. Johnson was the only one that had a key to the sub-station?

Mr. Racine: That is objected to as improper cross examination, this witness was not asked as to any key to the sub-station.

The Court: He may answer if he knows.

A. I don't know. I know the only time that we went in the place was when Howard Johnson opened the lock and let us in.

Q. Whenever you saw any of these so-called railroad electricians in the sub-station they were let in by Howard Johnson, the same way that you got in that day, were they?      A. I imagine so.

Q. Who was the foreman that you mentioned that was up on the ice docks?

A. Guy McClellan.

Q. He was also a Pacific Fruit Express Company employee?      A. Yes, sir. [155]

Mr. Anderson: I believe that is all.

Mr. Racine: That is all.

GUY McCLELLAN

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Racine): Your full name is Guy McClellan? A. Yes, sir.

Q. Where do you reside?

A. 539 North Main Street, Pocatello.

Q. What is your position now and what was it on and prior to November 4, 1950?

A. Shift foreman for the Pacific Fruit Express ice plant at Pocatello.

Q. Where were you on November 4, 1950, during the day time?

A. I was foreman of the ice dock, that is the dock that runs for 87 car lengths between two tracks.

Q. To your knowledge, Mr. McClellan, prior to November 4, 1950, who was called at the Pacific Fruit Express plant or by the Pacific Fruit Express when there was any electrical difficulty out there?

A. The Union Pacific Railroad was generally called.

Q. What occurred on November 4, 1950, with respect to the electricity at the ice plant? [156]

A. I can't say exactly what time it went off. I was told that morning that it was going off, that they were going to turn the power off that morning.

Q. Just relate to the Court and jury the cir-

(Testimony of Guy McClellan.)

cumstances and who was present when you were informed that the power would be off?

A. Well, I was coming from the clock room, Mr. Howard Johnson, the assistant plant manager, was there and told me the power was going off. He said we would have to wait a few minutes and so we stood there talking and this fellow came up, his name I can't remember, that was three years ago and I can't remember his name, but he introduced him as the Union Pacific electrician and said that was the man that he was waiting for before he turned the power off. The time that the power went off I can't tell but I do know that the power went off that morning, I know that there was no heat in the office and there was no power on the platform to operate the chain.

Q. What happened later on that day with respect to the sub-station located just south of the ice plant, as to what you observed or saw about it?

A. Well, I saw this smoke come out of the transformer——

Q. Now, just a moment, where were you at about the time you saw that, when you observed it, and what time was that? [157]

A. Well, to be exact, I said that was about 87 car lengths long, the platform, and it is divided in spots one to 87, and about the middle or close to the middle is spot No. 40, that is approximately the middle of the platform, and about No. 35 is just a little west or north from the spot across in com-

(Testimony of Guy McClellan.)

parison to the transformer, and that is where we were icing this car, at spot 34 or 35. We were hauling ice to this heavy salter,—I just happened to glance over and I saw a little bit of smoke, there wasn't much and I went on down towards this car and I suddenly decided that smoke should not be in the transformer or coming from the transformer if the power was off, and I looked back. I knew that LaVerl Johnson was working on the electricity or on the transformer because I had talked to him earlier that morning. The first thing that crossed my mind was that someone was electrocuted and the only one that could be in there was LaVerl Johnson. So I started down the steps to the office,—I knew that pulmoters and artificial respiration was the best thing for a person who was electrocuted and I rushed into the office and called the fire department. One of the fellows in the office went over to the transformer, he jumped the fence there and went over and he came back and said, "He is dead." I looked over out of the window and I could see that he was moving, his leg was going up and down. I said, "He is still alive." [158] We all rushed out there and I ran into the cage and I was going to pull him out and someone said, "Leave him alone." I didn't know whether to touch that line or not or the arrester, I thought it might get me and so I went back. The ambulance came, the fire department and the pulmotor squad came, and this fellow that was in the office took an ice pick and reached in the fence and put it in LaVerl's belt

(Testimony of Guy McClellan.)

and pulled him off. Then I think the ambulance took him away.

Q. Do you know whether LaVerl Johnson was an electrician?

A. I don't imagine so, I wouldn't say so.

Q. You mentioned that he was working with electricity, do you know what he was doing?

A. He mentioned it to me earlier that day. There is a transformer cage inside, next to the ice plant, and he was in there painting the leads to the transformer with red lead or some kind of red paint and I spoke to him, just general conversation, and then I went up to the platform, that is where I spent most of my time. That is all I knew about him working with electricity, I meant that he was painting the leads.

Q. He was just painting?                    A. Yes, sir.

Q. Now, Mr. McClellan, to your knowledge what is the fact as to whether or not there was work going on on the electrical [159] equipment at the plant or around the plant throughout that day?

A. Yes, sir, I saw the lid of the transformers off, that is, the top plate off, but I didn't see anybody in there, I meant there was the person that I referred to in there but he was the one that I remembered that was introduced as the Union Pacific electrician, he and Mr. Johnson was gone at the time that I was past the office talking to LaVerl Johnson, they were over at the P.F.E. car shops, I think, at that time and that is approximately a quarter or a half mile from the ice plant.

(Testimony of Guy McClellan.)

Q. To your knowledge, Mr. McClellan, when this accident occurred there that afternoon, do you know whether the Union Pacific was called?

A. I don't remember whether I called them or not, I called about everybody that I could think of.

Mr. Racine: That is all.

### Cross Examination

Q. (By Mr. Anderson): You wouldn't say definitely that you called anybody in the railroad company that day, would you?

A. Where I was at, in the office, there are no numbers posted and I just grabbed the telephone book and I started to call the police, the fire department and the ambulance.

Q. That was your interest at that time, wasn't it? [160] A. Yes.

Q. That is, to get help for LaVerl?

A. Yes, if possible.

Q. And you would not say that you called anybody at the railroad?

A. Well, I can't remember whether I did or not, sir.

Q. In the early part of your testimony you stated that the Union Pacific Railroad was generally called about electrical work. I suppose that they also called the Idaho Power Company, don't they? A. Not to my knowledge, I never did.

Q. Did you ever call any Union Pacific electrician yourself?

A. I have called the powerhouse twice, I be-

(Testimony of Guy McClellan.)

lieve, in the three or four or five years that I have been out there.

Q. And what was that for?

A. One night we had a bad storm and the power went off, I work mostly at night.

Q. That was probably some fuse on the power line?

Mr. Racine: We object to this, if the witness knows, he can say, but we object to this as not a fair and proper question.

The Court: The objection is sustained. He can tell what he knows about it.

A. I don't know anything about electricity.

Q. You don't know what caused the power to go out? [161]

A. No, sir, it could be running into the ground or up in the sky and I would not know the difference.

Q. Now, this Union Pacific electrician you mentioned, who introduced you to him, was it H. O. Johnson?

A. Yes, sir.

Q. How did he introduce him to you?

A. Well, it was rather peculiar, he told me this fellow's name and I don't know but it seems that people's faces and forms stick in my memory more than anything else and I remember this fellow looked more like a farmer than a electrician and I said, "Good Lord, that man is not an electrician, is he?" And he said, "Yes, he is a U.P. electrician." That is all that I know about whether it was a U. P. man or anything else. \* \* \* \* \*

(Testimony of Guy McClellan.)

Q. Pardon me, Mr. McClellan, do you remember being up in my office about ten days ago when Mr. Shoup and you and I were there, do you recall that occasion?

A. Yes, sir.

Q. And isn't it a fact that you stated to us that if you were put under oath you could not——

The Court: Mr. Anderson, I have had this same matter up quite often and I just want to caution you that if you ask him a question concerning a matter in [162] your presence for the purpose of impeachment then of necessity you might be required to take the witness stand and you would not be permitted to proceed with this case, I have had that up so much about conversations between attorneys and witnesses,—however, you may go right ahead, I don't want to stop you but I thought I better call the matter to your attention. [163]

\* \* \* \* \*

Q. The only reason that you say that this man was a Union Pacific electrician was because Mr. Johnson introduced you to him as such?

A. At the time that I met this man,——

Q. Will you please answer the question?

A. May I answer it in my own way?

Q. Well, isn't it a fact that the only reason you say that he was a Union Pacific electrician was because Mr. H. O. Johnson introduced you to him as such, isn't that right?

A. Basically, yes, sir.

Q. So that you don't know except for that, that he was a Union Pacific electrician?

(Testimony of Guy McClellan.)

A. No, sir.

The Court: Now, you may explain your answer if you desire.

A. Well, like I say, I asked Mr. Johnson if he was an electrician because of his appearance. He told me that he was a Union Pacific electrician.

Q. How did it interest you to know that he was an electrician, is that because Mr. Johnson said that he was an electrician?     A. Yes.

Q. Do you know how that happened to be brought into the conversation that he was a Union Pacific electrician?

A. Well, I was kidding Mr. Johnson about the man's appearance and being an electrician. [164]

Q. He looked like a farmer to you and you did not think he was an electrician?

A. That is right.

Q. Mr. H. O. Johnson who introduced him to you is now deceased?     A. Yes.

Q. He died very suddenly?     A. Yes, sir.

Q. You mentioned the fact that you had some discussion with LaVerl Johnson that morning about the work that he was doing?

A. I didn't say that, sir.

Q. What was it that you said about that, you said something about the work he was doing in the small transformer cage in the ice plant?

A. He was painting the leads when I stopped to talk to him,—just common ordinary talk.

Q. He was painting the leads in the small transformer cage in the ice plant?     A. Yes, sir.

(Testimony of Guy McClellan.)

Q. You saw him doing that? A. Yes.

Q. And those were wires that were taped up and came either in or out of the transformer?

A. Yes.

Q. Did he tell you what he was going to do over in the big [165] transformer cage where he was injured? A. I don't recall that.

Q. You don't know whether he told you or not?

A. I don't recall that; hardly anything was mentioned about his work.

Q. Where LaVerl was injured, in the transformer cage, he was not injured at a transformer?

A. They told me it was at the lightning arrester.

Q. At the lightning arrester?

A. Yes, whatever you call it.

Q. Those were back of the transformers, to the east about 10 or 15 feet? A. About that.

Q. As you come in the gate of the transformer cage, there were three transformers in front of the gate?

A. I think there are three there, yes.

Q. And the lightning arresters at the back?

A. Yes.

Q. Did you happen to observe any foot prints of Mr. Johnson's from the gate around to the lightning arresters?

A. Yes, there was quite a discussion about the foot prints and what did take place.

Q. Did you see them? A. Yes.

Q. After he entered the gate, he turned to the left and went [166] around the transformer, that

(Testimony of Guy McClellan.)

is the north transformer, and then switched back and then to the east lightning arrester and then south to the south lightning arrester?

A. Yes, sir.

Q. Those lightning arresters, they don't look anything like transformers, do they?

A. No, not like the ones in front.

Mr. Anderson: I think that is all.

Mr. Racine: That is all, thank you, Mr. McClellan.

MILTON T. SARGENT

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Racine): Your full name is Milton T. Sargent?     A. Yes, sir.

Q. And you reside in Pocatello?

A. Yes, sir.

Q. By whom are you employed?

A. The Idaho Power Company.

Q. What is your position?

A. I am division chief clerk.

Q. As such, in that position, do you have the responsibility for the records regarding the charges to the customers of [167] various types, showing the amounts of electricity furnished?

A. Yes, sir.

Q. Do you have under your control and supervision the records as to the year 1950?

A. Yes, sir, I do.

(Testimony of Milton T. Sargent.)

Q. And do you have such records with respect to the electricity furnished to the Union Pacific Railroad Company by the Idaho Power Company?

A. I do.

Q. Do you have such records with you in court?

A. I do.

Q. What period of time do those records cover?

A. From the 20th of December, 1949, that is, approximately the 20th of December of 1949 to the 20th of November, 1950.

Q. Now, do you have any records under your control or supervision with respect to the power furnished to Pacific Fruit Express Company in Pocatello? A. I do not.

Q. As a matter of fact, do you know whether the Idaho Power Company furnished power directly to the Pacific Fruit Express Company and bills them for it?

A. There is no billing. I cannot say whether we furnish power or not. There is a possibility that we don't furnish all of it. I am not at all familiar with the electrical end and I cannot tell you. [168]

Q. But there is no charge to the Pacific Fruit Express Company?

A. No, there is no charge in our records, that is right.

Q. Do you have all of those records with you?

A. Yes, I believe I have everything that you requested, I think they are all included in this (indicating).

Q. Mr. Sargent, you have been handed Exhibit

(Testimony of Milton T. Sargent.)

No. 18, marked for identification, you are familiar with what the exhibit represents?

A. Yes, sir.

Q. Does that include the billings that you have testified to?     A. Yes, that is right.

Mr. Racine: We would like to offer Exhibit No. 18 in evidence at this time.

Mr. Anderson: We object to Exhibit No. 18, if the Court please, this relates to electrical energy furnished to the Union Pacific Railroad Company by the Idaho Power Company. It has no connection with this case, it is charged that the Union Pacific Railroad Company furnished the electrical energy.

The Court: It may be admitted.

Mr. Racine: That is all. You may cross examine.

#### Cross Examination

Q. (By Mr. Anderson): There might be some power furnished to the Pacific Fruit Express Company that you are not aware of?

A. I think there is a possibility that there is power furnished to the Pacific Fruit Express Company,—not direct but indirectly it comes from the Idaho Power Company.

Mr. Anderson: That is all.

Mr. Racine: That is all, thank you, Mr. Sargent.

DR. DAVID JOHN NELSON

called as a witness by the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Racine

Mr. Racine: If the Court please, this may be a little out of order but the doctor was available at this time.

The Court: That is quite all right, we try to make it as convenient as possible for these doctors, realizing they are busy.

Q. Your full name, Dr. Nelson?

A. David John Nelson.

Q. Where do you reside? [170]

A. Pocatello.

Q. Are you acquainted,—strike that, please,—are you admitted to practice your profession, the profession of medicine in the State of Idaho?

A. Yes.

Mr. Anderson: We will admit the doctor's qualifications.

The Court: The qualifications of Doctor Nelson are admitted.

Mr. Racine: And you will admit, Mr. Anderson, that he is an orthopedic specialist?

Mr. Anderson: Yes, we will.

Q. Are you familiar with LaVerl Johnson?

A. Yes, sir.

Q. When did you first become acquainted with LaVerl Johnson?

A. I first saw him on the second of May, 1951.

(Testimony of Dr. David John Nelson.)

Q. And what were the circumstances?

A. I was called to the old General Hospital by Dr. Hughart to act as consultant for Dr. Hughart in this case and to examine the patient and carry out what treatment seemed necessary.

Q. And the nature of Mr. Johnson's wounds were in accordance with your practice, your specialty?

A. Yes, they were.

Q. What was Mr. Johnson's condition when you first saw him,— [171] when you first observed him in your professional relationship?

A. When I first saw him on May 2, 1951, I found that he had already,—before my first visit, that he had three amputations, both legs approximately six inches below the knee had been amputated, the right arm had been amputated approximately three inches below the shoulder joint. These were guillotine type of amputations——

Mr. Casterlin: Now, we object to this as being demonstrative and prejudicial, I think that the nature of the previous operations or amputations are entirely immaterial in their detail, because this is not a suit for malpractice.

The Court: The objection is overruled.

Q. Just proceed, Doctor.

A. The reason that I mentioned that the amputations were of a guillotine type is because due to the type of injury, trauma which the patient suffered, it was necessary to get rid of gangrenous tissue and no attempt could be made at that time to give him a definitive operation or a complete

(Testimony of Dr. David John Nelson.)

amputation, the guillotine was done. This does not leave a stump or an amputated extremity which is suitable to be fitted with an artificial limb, although the previous surgery, to my opinion, had been just the right thing to do and was successful; the patient required further surgery now that the danger [172] of infection had passed. I so stated on his hospital record that what we call a revision of the amputation stumps was then in order.

Q. What was then done, Doctor?

A. Dr. Hughart requested that I take the patient over as my own and proceed with what I felt was necessary. The next day, May 3, 1951, I took the patient to the operating room and began by taking care of the left stump first, the amputated stump of the left leg. The scar tissue was removed and about three-fourths inch of bone was removed from the tibia, the main leg bone, and about two inches from the smaller leg bone, called the fibula, was also removed. In doing so this allowed healthy skin and fat of the upper part of the stump to be brought together over the end of the stump and thereby giving a good covering to the end of the stump. Also, at that time an ulcer on the stump of the right leg was cleaned out and some bone removed from that.

Q. Doctor, what do you mean by an ulcer?

A. An ulcer in this case was where an area of skin and underlying tissue, approximately an inch and a half by three inches was missing from the side of the stump just below the knee on the right

(Testimony of Dr. David John Nelson.)

and the bone was bare and exposed to the air. So it was necessary to get this bone covered by skin, so this entire area which contained some fragments [173] of dead tissue and bone was thoroughly cleaned out and in that way was prepared for a skin graft, which I felt at that time and which subsequently turned out to be true. Then I gave a skin graft, I felt that I could skin graft, by laying new skin over that area in about a week and close it up and allow it to heal. That was the first operation.

Q. That was in May?

A. That was on May 3rd.

Q. What is the fact, Doctor, as to whether or not such operation or treatment which you gave on May 3 was or was not painful to the patient?

A. Yes, it was painful.

Q. How long, if you know, Doctor, was Mr. Johnson in the hospital on that occasion?

A. I discharged the patient on May 26, 1951. The operation had healed well,—I would have to consult the hospital records to find the date but sometime between the first operation on May 3 and May 26th an operation was done on the stump of the right arm, I don't have the exact date on my records but I do have it on the hospital records.

Q. It is on the hospital records?     A. Yes.

Q. Aside from the exact date, do you recall the nature of the operation on the stump of the right arm? [174]

A. Yes, that was essentially the same as done on

(Testimony of Dr. David John Nelson.)

the left leg, we removed scar tissue and removed a part of a nerve which was caught in the scar tissue and also removed some bone and covered the area with skin which was present there. In other words, it was a revision of that stump.

Q. Doctor, would that be painful?

A. Yes, that was also painful.

Q. When did you next see Mr. Johnson following his discharge from the hospital the latter part of May, 1951?

A. I next saw him,—well, I saw him every few days actually. Either I saw him or Dr. Hughart saw him and sometimes both of us together, I didn't keep track of all of the dates, but it was a matter of removing the stitches, changing dressings, and waiting for him to improve in strength until further surgery could be done.

Q. Subsequent to the first operation, until the later operation you would see him frequently, I take it?

A. Yes, sir.

Q. When was the next operation accomplished?

A. Well, all three of these operations,—I should say all four of them, although some of them were combined, they were all done in the hospital there at the one hospitalization, so that when he was discharged May 26th, 1951, all of the surgery had been done.

Q. Wasn't there later surgery, in July of 1951?

A. I don't recall.

Q. Will you observe these hospital records to refresh your recollection?

(Testimony of Dr. David John Nelson.)

Mr. Casterlin: He is being offered the hospital records for that purpose only?

Mr. Racine: Yes, for that purpose only.

A. Yes, I was mistaken on my notes or records, —the revision of the right stump was done on July 21, 1951, in the same manner as I described for the left leg.

Q. I think you testified that was painful?

A. Yes.

Q. You thought that you did that in May?

A. Yes, I was wrong on that.

Q. Now, Doctor, what was the nature of the anesthetic used to accomplish this operation or rather these operations?

A. Will you repeat that please?

Q. Yes, the anesthetic, was it a general or local?

A. It would be a general anesthetic.

Mr. Casterlin: We object to that as immaterial, he has testified to the essential facts that he had the operations, that they were painful, and I think now the extent of the anesthesia is unimportant.

The Court: I think the whole matter should come in, it should go to the jury, I am sure. I will allow him to answer. [176]

A. It was a general anesthetic for all of the operations.

Q. Now, Doctor, following the July operation, when did you next see Mr. Johnson, if you now recall?

A. I next saw him on August 1, 1951.

Q. What was that occasion?

(Testimony of Dr. David John Nelson.)

A. That was to remove the stitches and change the dressing and to examine the wounds.

Q. If you would, Doctor, just to get along a little faster, go through right from then on, the various occasions that you did observe Mr. Johnson, when you did see him and undertake any operations further?

A. On August 23, 1951, I saw him again, at which time I made some plaster models which are patterns of the stumps so they could be sent to the Chester-Bray Shop in Boise for making artificial limbs. Then again on September 10, 1951, I saw him and arranged for the patient to go to Boise to have made and fitted these artificial limbs. He stayed in Boise at the Elks Convalescent Home to be shown how to use them, however, after about a week he developed a blister,—I don't remember which stump but he did develop the blister which necessitated his leaving the stump off for a time so the came back home. Not having had the usual length of time to learn to use these artificial limbs, he came back home until this blister healed and then began using them again. I saw him in October of 1951 and he was beginning to walk [177] fairly well, he was using the artificial legs and a cane. He was not able to walk very far. He was getting some chafing from the artificial limbs but seemed to be doing as well as could be expected for that length of time. My next note is on January 9, 1952, he came in because both stumps were somewhat irritated from walking. He was shown how to treat these with Lanolin oint-

(Testimony of Dr. David John Nelson.)

ment. On March 4, 1952, I saw him because of what we call cellulitis, which is a low grade infection of the skin at the end of the left stump. I gave him Penicillin and advised him not to use the limb for at least a week and to use hot soaks and this cleared up. I saw him again on April 28, 1952; he had a crack in the skin of the left stump and this was treated and healed. I saw him in June, it was June 30, 1952, and the patient at that time was having some irritation where the weight comes on the stump,—the left stump. At that time I advised that the artificial limb have an extra attachment put on top to bear some of the weight on the hip bone instead of all of it being borne on the stump. He was subsequently fitted with such a piece. He had very little trouble after that until I saw him again on October 20, 1953, at which time the artificial limb didn't seem to fit quite so well. I advised that the ischio ring, or the part that bears the weight on the hip be raised up and that has been done. That was the last time that I [178] have seen him as a doctor, that was on October 20, 1953.

Q. Now, Doctor,——

A. ——Just a minute, if I may retract that statement. I did see him on Saturday, this past Saturday, but since I had these records at home I do not have a note on the chart, but I did see him this past Saturday and found him having some irritation of the right stump from his prosthesis or artificial limb, in the area where this skin graft had been done originally.

(Testimony of Dr. David John Nelson.)

Q. Now, Doctor, from your most recent examination of LaVerl Johnson and from your general treatment of him, what is your prognosis or what is your opinion as to what further operations may be necessary?

A. The only possibility as to further surgery, as I see it at the present time, is that this area that was skin grafted may have to be treated further in that at the time, a thin piece of skin was the only skin that would take or grow and that may need to be removed and further revision done at that point. Possibly with the removal of a little more bone.

Q. And will that require an anesthetic?

A. Yes.

Q. And will it be painful?

A. Somewhat, yes.

Q. What is your opinion, Doctor, your medical opinion as to the use of the limbs of LaVerl Johnson, the artificial limbs and [179] the treatment necessary, the treatment and difficulties that he may experience in future life as he grows older, that is, regarding the use of the artificial limbs?

A. As regards the artificial arm, because of the very short stump, practically no stump of the right upper arm remains, that type of artificial arm is not very useful. In fact, it is very frequently discarded as being more in the way than of any value since there is no way in which they can activate or motivate it. They cannot move it themselves so I don't think that the right arm prosthesis,—although he was fitted with as good a one as can be obtained,—

(Testimony of Dr. David John Nelson.)

they are not too satisfactory. As to the artificial legs, I believe that every amputee experiences the same thing as I have mentioned in these notes, they get irritation, little fissures in the skin, blisters, sometimes infected hairs and they all have to leave their limbs off several days at a time, perhaps two or three times a year. It varies with different individuals, but they can never wear them constantly and continuously because of the irritation on the skin.

Q. Doctor, do you know of your own knowledge whether Mr. Johnson can attach these limbs without assistance, without any help, and take care of himself in that way?

A. Yes, he has done that in my office—that is the legs,—I have not seen him take the arm part off and on. [180]

Q. You don't know about that?                      A. No.

Q. Do you know approximately the expense of those limbs?

Mr. Casterlin: We object to this as not being within the four corners of the complaint and in this connection I suggest a conference with your Honor before any ruling is made on this matter, I suggest that conference in the absence of the jury.

The Court: In case, after a conference the Court holds that it is competent would it be necessary to call this doctor again or would you stipulate as to that?

Mr. Casterlin: I think if we could have three or four minutes that we can finish this right up.

(Testimony of Dr. David John Nelson.)

The Court: I want to finish with the examination of this doctor before noon because I know they are busy and I don't want to call him back this afternoon if we can avoid it.

Mr. Casterlin: I think the cross examination will be very short.

The Court: The jury may retire for a few moments.

Mr. Casterlin: Generally, the point is, that the man is receiving compensation from the Industrial Accident Board and the terms of the Board are that he shall [181] be furnished this medical attention so that he is without personal expense and the amount of it is immaterial.

The Court: The only trouble with that, Mr. Casterlin, is that at the end of this trial in case that there was a verdict in favor of the plaintiff, they are going to take all of that money away from him.

Mr. Casterlin: That is true, I wonder if I may ask the Court for permission for Mr. Anderson to explain this matter. He is more familiar with the operation of the Industrial Accident Board.

The Court: Yes, he may go ahead with his explanation.

Mr. Anderson: As to the artificial limbs and even the hospital and medical expense, that is provided for by the Union Pacific Railroad Company Employees' Hospital Association, which is a separate corporation providing service for employees who belong to that association and pay dues, and the

(Testimony of Dr. David John Nelson.)

artificial limbs, the original ones at least, are paid for by that association in accordance with the dues paid into the association. I think that is correct, isn't it, Doctor, you can answer that?

A. That is correct.

Mr. Racine: Probably that is correct and what we are getting at is that this man is a young man and he has many years in which to live. If he is going to have [182] to buy these legs from time to time and they run into a substantial sum of money then certainly it should be a part of his general damages. Our client informs us that he has been informed that they will buy but one set of legs.

The Court: You can ask him about the future, not what has already been furnished. Mr. Bailiff, recall the jury.

Mr. Racine: Will you strike that previous question, Mr. Reporter, and I will ask this.

Q. Doctor, is it probable that through Mr. Johnson's lifetime he will be required to replace the limbs which he has been fitted with, as he goes along?      A. Yes.

Q. Do you have any thought or estimate as to how frequently that may occur?

A. It varies a great deal as to a person's occupation and how much he uses the limb,—how much he walks around. Naturally a man in heavy labor will wear out a limb faster than one in a more sedentary type of occupation. I could only give a rough estimate and that is that an artificial limb usually lasts five to seven years, that is the legs.

(Testimony of Dr. David John Nelson.)

Q. You say those are the legs you are speaking of? A. Yes.

Q. Do you have any information as to the cost of such limbs?

A. The cost of the artificial arm, I can give that exactly, [183] the total cost was \$462.00. That includes a cosmetic hand which is rarely worn and that cost \$40.00, and that would practically never wear out, so it would be approximately \$422.00 for that part that they use. The artificial legs would run about \$300.00 each.

Q. Do the limbs require repair and upkeep from time to time? A. Yes.

Q. Do you have any knowledge as to the probable cost of that?

A. That varies a great deal, depending upon what wears out.

Q. But there is a cost in that connection and repairs are necessary? A. Yes, sir.

Q. Now, Doctor, what is the fact as to your medical knowledge with regard to whether or not LaVerl suffers and is in pain in the use of those limbs, would you know as to that?

A. I wouldn't say there was very much suffering now.

Q. Would it be painful to walk on the limbs, particularly if they chafe or if there is irritation?

A. Only at times.

Q. When there is irritation? A. Yes.

Mr. Racine: You may inquire.

(Testimony of Dr. David John Nelson.)

Cross Examination

Q. (By Mr. Casterlin): Doctor Nelson, as you view the patient now, what have you to [184] say as to the probability of irritation from the use of the artificial limbs in the future?

A. We can almost guarantee that he will have at least one week a year where he cannot wear them.

Q. Doctor, you have mentioned renewal with respect to the limbs; what have you to say about renewal with respect to the arm?

A. Well, since they hardly ever use them, that is, very much, it would last a great deal longer than the artificial legs. They do get out of order more easily than the legs, in that they have more moving parts and they are made of lighter construction and they tend to break easier. However, that is more repair rather than a matter of replacement.

Q. You mentioned revision of the left leg. I am not certain as to when that took place, as to whether it took place between May 3rd and 26th or later?

A. The revision of the left leg was first; that was done May 3rd.

Q. And the revision of the right leg?

A. The revision of the right leg was on July 21, 1951.

Q. The arm and the left leg then was between May 3rd and May 26th?      A. Yes, sir.

Q. You mentioned the means or the manner of the amputation of the limbs in the first instance.

(Testimony of Dr. David John Nelson.)

Would you say that was the proper method to use in this case? [185]           A. Yes, sir.

Q. Prior to the time that you got the case, you find nothing in connection with this treatment that was improper?

A. No, I think the treatment up to the time that I saw him was exactly right.

Q. As to your treatment, did he progress normally, about as the usual amputee would have progressed?

A. Yes, or perhaps a little better.

Q. I think that you stated your prognosis as to his condition, that is, as to what his condition would be in the future?

A. I think he will remain essentially as he is with occasional days where he cannot wear the limbs. Possibly with this one operation necessary if the skin which was placed there does not hold up, if it is not tough enough to stand the irritation from the limb.

Q. With those exceptions he will progress well or remain as he is?

A. As he is now, yes.

Mr. Casterlin: That is all.

### Redirect Examination

Q. (By Mr. Racine): Doctor Nelson, has LaVerl Johnson been cooperative at all times, would you answer?           A. Yes, very.

Mr. Racine: That is all, Doctor. [186]

The Court: It is so near noon now I am going

to recess because we are going to take up early after lunch. I will now adjourn until 1:15 this afternoon.

November 23, 1953, 1:15 o'clock p.m.

EARL R. GILBERT

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Racine): Your full name is Earl R. Gilbert?            A. Yes, sir.

Q. Where do you reside, Mr. Gilbert?

A. 934, West Center, Pocatello.

Q. Have you ever been a witness before?

A. Not in Federal Court.

Q. Well, you just speak up so that the Court and jury can hear and address your remarks to the jury.            A. Yes.

Q. You live here in Pocatello?            A. I do.

Q. And what is your work?

A. I am district foreman for the Idaho Power Company.

Q. What was your work on November 4, 1950?

A. I was district foreman of the Idaho Power Company at that time.

Q. What does that work involve?

A. I am in charge of the construction and maintenance and service in Pocatello area.

Q. In the Pocatello area?            A. Yes, sir.

(Testimony of Earl R. Gilbert.)

Q. For how many years have you held that position? A. 24 years.

Q. For how many years have you been involved and engaged in electrical construction and maintenance work or business?

A. The whole time would be 37 years.

Q. On November 4, 1950, and prior to that time, if you know, from whom did the Pacific Fruit Express Company in Pocatello obtain its electricity?

A. It is tapped off the Union Pacific Batiste line.

Q. Who is that line controlled by?

A. It is controlled by the Union Pacific Railroad Company.

Q. You know that, do you? A. Yes, sir.

Q. Before we go into the exhibits which you have in your hand, Mr. Gilbert, will you state if you know of your own knowledge on November 4, 1950, and prior to that time who did the work on the electrical apparatus and that type of equipment at the Pacific Fruit Express Company plant? [188]

A. The Idaho Power Company did not do it. I cannot say who did all of their work but on two different times electricians from the shops have been there when I have been called.

Q. From what shops?

A. From the Union Pacific shop under Irv Eskelsen.

Q. You stated that the Idaho Power Company did not do that work? A. That is right.

Q. You have in your hand Exhibits No. 14, 16

(Testimony of Earl R. Gilbert.)

and 17, I will ask you if you recognize what is shown by those exhibits?      A. I do.

Q. What is it?

A. This is the sub-station yard at the Pacific Fruit Express ice plant located south of King Street on Harrison Street.

Q. Just south of the plant itself?

A. Yes, sir.

Q. Did you have occasion on November 4, 1950, to go to that sub-station?      A. I did.

Q. Would you state when and under what circumstances?

A. If I may digress, I was at a football game when the call came in that a man was injured at the P.F.E. plant. As quick as I got in my car I got a radio contact and went immediately out there.

Q. What did you observe there?

A. The east fence was raised up, the pole top switch was open [189] but the disconnect switches on the lightning arresters was not open. In other words it was hot to the lightning arrestors and the lightning arresters set about three and a half feet above the ground which made the 12.5 hot contacts this close to the ground running into the lightning arresters.

Q. What do you mean by 12.5?

A. The voltage between phases on that line.

Q. Does that mean twelve thousand five hundred volts?

A. Twelve thousand five hundred volts, that is what it is. It is classified as a 12-5 line.

(Testimony of Earl R. Gilbert.)

Q. Is that the amount of voltage going into the sub-station?

A. The amount between phases into the sub-station?

Q. As I understand you, when you arrived there the pole-top switch was open?

A. That is right.

Q. Will you explain to the Court and jury what you mean by pole-top switch?

A. The pole-top switch is a disconnecting switch that breaks a load between the line and the transformers, or it could break between two lines. In other words, it can kill a certain section of line. This here (indicating) definitely opened to kill the transformers at the Pacific Fruit Express yard.

Q. In being so open what was the fact as to the lightning arresters? [190]

A. They were still hot.

Q. And by being still hot what do you mean with respect to the voltage?

A. They are energized with 12.5 volts.

Q. Where was Mr. Johnson at that time?

A. Mr. Johnson,—well, I don't know whether it was Mr. Johnson or Mr. Shoup that I contacted at that time, or it could have been Mr. McClellan.

Q. Where was Mr. LaVerl Johnson?

A. He was in the hospital, I could see definitely where he had been against the hot wires.

Q. Will you describe what you mean by lightning arresters?

A. Lightning arrester is an instrument,—

(Testimony of Earl R. Gilbert.)

Mr. Racine: —First, I want to offer now Plaintiffs' Exhibit No. 20 which is an enlargement of Plaintiffs' Exhibit, an enlargement of either 14, 16 or 17, one of them.

Mr. Anderson: We have no objection to that.

The Court: It may be admitted. What was the number of that exhibit?

The Clerk: This is Exhibit 20. No. 19 was marked but it was not offered.

Mr. Racine: May the witness step down to this exhibit? [191]

The Court: Yes, he may do so.

Q. Now, Mr. Gilbert, will you step down here and point on the exhibit, for the benefit of the Court and jury, point out what is shown on the exhibit and what you know to be a lightning arrester?

A. Yes, and I can explain what a pole-top switch is. This is the pole-top switch located here (indicating). This is a rod for it and by turning a handle here (indicating) it breaks, it breaks that circuit, that wire that goes around here and feeds the transformer. These big things right here (indicating) are the transformers,—can you notice the difference, there are three,—no, there are four lightning arresters, there is one over here, one here, one here and one here (indicating). This lead as you can notice, the wire that comes off there and down here and contacts the top of this disconnect. That disconnect is closed. It comes down and feeds to these arresters. You will notice on this

(Testimony of Earl R. Gilbert.)

side is your fuse disconnect, where you fuse the transformer. With this switch open this is completely dead on the west side of the tower but three phases come down here (indicating) this low to the ground and feed into this arrester. One arrester is grounded and the other three hot phases come to this. This is an older type of arrester and is called the dry type, it doesn't need to be energized,—let me explain— [192]

Mr. Anderson: If the Court please, I think the witness has now gone beyond the question, I think he has fully answered.

The Court: I think you are right, however, it might save time if he was permitted to go ahead.

Mr. Racine: I will ask another question.

Q. Just explain the various electrical equipment as shown by the exhibit as you knew the equipment on November 4, 1950?

Mr. Anderson: It seems to us, your Honor, that he has already done that.

Q. To the extent that you have not explained it, Mr. Gilbert, as it existed there on November 4th, and shown by the exhibit, will you explain to the Court and the jury the electrical equipment shown and which existed at that sub-station on November 4, 1950?

A. We are not interested in the load side of that any more. Here is the line side connected ahead of the switch and leads down through the three disconnects to the lightning arresters. When the switch was open this line was still hot to the light-

(Testimony of Earl R. Gilbert.)

ning arresters because these three disconnects were not open.

Mr. Racine: You may inquire. [193]

### Cross Examination

Q. (By Mr. Anderson): Mr. Gilbert, how long is that line that goes from the sub-station across the track to the Batiste line?      A. Two spans.

Q. How many feet would you say?

A. I don't think it could be over 250 feet,—they are short spans,—there is one pole between that and the junction and this tower.

Q. The only purpose it serves is to serve this sub-station at the Pacific Fruit Express?

A. Yes, there is no other tap off it.

Q. Now, Mr. Gilbert, about what time of the day do you think that you got out there after the football game?      A. It was around 4:30.

Q. Do you know when the accident occurred?

A. Around 2:00, they said somewhere around 2:00 o'clock.

Q. Did you observe in the sub-station there any footprints of Mr. Johnson's?

A. I did, sir.

Q. Can you describe them, please, the course that they took?

A. Could I show it on the map, maybe I could show it better on this.

Q. Now, just a minute, first, let me ask this, the sub-station there is completely enclosed with a high fence? [194]      A. That is right.

(Testimony of Earl R. Gilbert.)

Q. And the gate is in what we term the west side? A. That is right.

Q. And as you enter the west gate, that is the only gate, isn't it?

A. That is the only entrance.

Q. Do you know whether that is kept locked?

A. It has been locked every time that I have been there.

Q. As you go in this gate, what is right immediately in front of you?

A. The three transformers immediately in front.

Q. To the left, in the northwest corner what is there?

A. The metering equipment for the 2300 volt,—this sub-station metered on the 2300 side or the secondary side of the transformers.

Q. That is customary, is it?

A. Yes, it could be both ways.

Q. But it is customary in instances of that sort?

A. Which ever is better, we meter both ways.

Q. Is there another switch near that meter, some sort that comes in by taped wires fom the transformers? A. I don't recall.

Q. As Mr. Johnson entered this gate, could you trace his foot prints for us as he turned to the left?

A. To his left? [195]

Q. Yes, and went around the meter box?

A. Between the meter box and the fence his prints were very plain, a man could see exactly his steps, I don't know if there was snow or not but you could see the footprints.

(Testimony of Earl R. Gilbert.)

Q. So he came clear around to the east of the transformer?

A. Clear to the east and on the neutral arrester he walked into it and back, he came to the south and that is where he touched the wire, on the south.

Q. You can only tell what happened from the footprints?

A. That's right, and they were messed up where he went on to the ground.

Q. Did the tracks indicate that he stopped anywhere except this neutral or ground wire?

A. They were straight to the ground and back on to the south side.

Q. Have you been out there quite a lot, out around there?

A. Several times, yes, that's right.

Q. I guess you know who operates that substation?

A. Mr. Shoup or Mr. Johnson generally contacted me. I have been out on two or three cases of trouble they have had there, transformer fuse blown out and once the transformer burned up and Mr. Shoup called me, Mr. Shoup or Mr. Johnson generally.

Q. Mr. Shoup of the Pacific Fruit Express, you mean?      A. That's right. [196]

Q. And also Mr. Johnson of the Pacific Fruit Express?

A. Yes, the Mr. Johnson that died.

Q. Mr. H. O. Johnson?      A. Yes.

Q. And how did they let you in?

(Testimony of Earl R. Gilbert.)

A. They always let me in at the gate, unlocked the gate.

Q. To let you in the gate? A. Yes.

Q. And they had the key?

A. That's right.

Q. You understand that the Pacific Fruit Express Company operates the sub-station?

Mr. Racine: We object to what he understands, especially by reason of what he has testified.

The Court: If he knows he may answer.

A. I know that they have the key, I don't know who operates it.

Q. Anytime that you have been there, you have been there at the request of Mr. Shoup or Mr. Johnson of the Pacific Fruit Express Company?

A. That is right.

Q. Did you ever see any Union Pacific men over there operating or in charge of that sub-station?

A. I noticed a Union Pacific electrician there repairing that sub-station.

Q. Do you know when that was, about? [197]

A. It happened about early in the spring after this accident.

Q. Afterwards?

A. Yes, one of the transformers burned up, that is why Mr. Shoup or Mr. Johnson, I don't recall which,—they were having trouble in the single phasing, this three phase motor would not start and they called me. I noticed the fuse out and I re-fused it but it wouldn't hold and so we

(Testimony of Earl R. Gilbert.)

disconnected,—we killed the switch, disconnected the transformer and tested each one individually to see which one was bad and that is as far as I went with them.

Q. These disconnect switches that you refer to that are above the lightning arresters, if whoever sent LaVerl Johnson in there to work that day had pulled those switches, then the lightning arresters would have been de-energized, would they not?

Mr. Racine: Now, we object to the form of that question as it is because it is assuming that whoever sent LaVerl Johnson in did pull those switches and there is no evidence to that effect, there is no fact in the record to base that on.

The Court: Well, the fact is they were not pulled and there is no inference as to who did it. You may proceed.

Q. Those disconnect switches could have been pulled, couldn't they? [198]

A. That is right, they could have been pulled.

Q. And that would have de-energized that lightning arrester?     A. Yes, that's right.

Q. Mr. Gilbert, can you tell me about how far it is from the transformers themselves back to the concrete base that the lightning arresters are on?

A. Well, just to judge that I would say about 12 feet. That is about a 30 foot square, the transformer yard, and I am just guessing at that. I have never measured that but it is my thought on it.

Q. This transformer sets over to the west,—the

(Testimony of Earl R. Gilbert.)

southwest of the railroad tracks that serve the P.F.E. ice docks, does it not?

A. The one outside of the engine room?

Q. Yes, where Mr. Johnson was injured?

A. Will you please state that question again?

Q. The sub-station sets to the west of the railroad tracks and the ice-dock?

A. To the west, that is right, and south of the Pacific Fruit Express ice plant.

Q. Except for the enclosure right around the sub-station, the rest of the area is open to the Pacific Fruit Express plant and over to the railroad tracks?

A. Just the one pole into the north that you see that interferes with any space there. [199]

Q. And then there is an open space for trucks and automobiles to park? A. Yes.

Mr. Anderson: That is all.

#### Redirect Examination

Q. (By Mr. Racine): Mr. Gilbert, on the occasions that you were called to the ice plant, if there was any trouble who did the work?

A. Generally the electricians from the railroad company.

Q. When you were there November 4, 1950, did you observe any hot-sticks? A. No.

Q. Will you explain what a hot-stick is, for the benefit of the Court and jury?

A. A hot-stick is a treated piece of laminated wood with a special type of shellac to waterproof

(Testimony of Earl R. Gilbert.)

it and is a non-conductor,—on the head, or on the top or one end of the stick, and it can be six or twelve or eighteen feet long, it has a head on it with a finger that sets out to the side, the finger is what they pull that disconnects or use to fuse the transformer with.

Q. You use the hot-stick to pull the disconnect switch, is that right?      A. That is right.

Q. Had you ever observed or noticed a hot-stick out at that [200] sub-station?

A. I never had.

Q. Is that customary equipment for such a place, a hot-stick?

A. In our sub-stations we have hot-sticks.

Mr. Racine: That is all.

#### Recross Examination

Q. (By Mr. Anderson): You would not say that the Pacific Fruit Express did not have them?

A. I wouldn't say, I didn't see any.

Q. But you would not say that the Pacific Fruit Express did not have a hot-stick available?

A. I know that I had to pull them one time and they didn't have one then. I never did see one there, I had to pull the disconnect when they were making some change on the transformer.

Q. They might have had one over in the ice plant?

A. They might have, but I never did see it.

Mr. Anderson: That is all.

Mr. Racine: Nothing further. [201]

HAROLD W. RISING

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Racine): Your full name is Harold Rising? A. Harold W. Rising.

Q. Where do you live, sir?

A. At Idaho Falls.

Q. What is your occupation?

A. I am manager of the Gem State Electric Company.

Q. At Idaho Falls? A. Yes, sir.

Q. For what period of time have you been engaged in electrical work or in the electrical field?

A. That period of time would be somewhat indefinite. It would extend over a period of probably 30 years, of which time five or six years I was out of the game.

Q. On November 4, 1950, what was your work, Mr. Rising?

A. I was State Electrical Inspector.

Q. Was that for the State of Idaho?

A. Yes, sir.

Q. And by whom were you employed?

A. By the State of Idaho.

Q. After November 4, 1950, I will ask you if you had occasion [202] to inspect this sub-station at the Pacific Fruit Express Company plant?

A. Yes.

Q. And what date was that?

A. That was January 18, 1951.

(Testimony of Harold W. Rising.)

Q. Mr. Rising, I will ask you if you will step down and examine Exhibit No. 20 that is attached to the board. Now then, I will ask you if that is a fair representation and illustration of the sub-station when you visited it in January of 1951?

A. Yes, as nearly as I can remember it.

Q. Mr. Rising, based upon your knowledge as an electrician and your work as an electrical inspector for the State of Idaho, I will ask you to explain your understanding of the equipment as shown there in that exhibit?

A. You want me to describe it?

Q. Yes, go ahead and describe it.

A. The whole structure is what is known as a sub-station structure. Its purpose is to receive and reduce voltage on incoming power with this equipment shown here (indicating). It is metering equipment here (indicating). The transformers as have been previously been pointed out are these three objects whose function is to reduce the voltage from 12,500 volts between phases to, I believe, 23,000 volts. I am somewhat uncertain as to the secondary voltage. These objects (indicating) are the pole-top [203] switches, the three of them together constitute what is known as a Gandy operated pole-top switch, operated by this handle from the ground. These objects (indicating) four of them are lightning arresters. Their object is to drain off surges of excessive voltage, presumably which excessive voltage would be caused by lightning.

Q. Now, will you just explain what is the fact as

(Testimony of Harold W. Rising.)

to the pole-top switches, as to its operation and what voltage and current coming in it would effect?

A. The operation of the pole-top switch as they were connected at that time would interrupt the flow of current through the conductors that flow down through the cut-outs and down to feed the transformers, which would in effect,—the operation of those switches or the opening of the switch would interrupt the current to every thing except the conductors which feed down through this disconnect to the lightning arresters.

Q. By operation of the so-called pole-top switch was there any method whereby the current coming into the lightning arresters would be eliminated?

A. No, sir.

Q. What method would be required to eliminate the current coming into the lightning arresters?

A. It would be necessary to open these three disconnect switches with a hot-stick. [204]

Q. Now, Mr. Rising, what is meant by the term load?

A. The term load?

Q. Yes, in electricity, what is meant by the load side?

A. The term load side is the opposite side from the feed side.

Q. In this sub-station what would the load side indicate?

A. The load side would be all of the conductors between the disconnecting switch and the metering equipment,—and even the load side of the metering equipment, I presume, I would say between the dis-

(Testimony of Harold W. Rising.)

connect switch and the point where the current leaves the sub-station.

Q. Do you mean where it leaves it or comes in?

A. Where it leaves it.

Q. Mr. Rising, what would be the fact as to the side fed by current down to the lightning arresters, would that be the load side?

A. Will you restate that question, please?

Q. I may not be very clear on that myself. Where was the switch which would disconnect everything in the sub-station or was there such a switch?

A. There was no such a switch.

Q. Was there any switch outside of the sub-station which would disconnect everything in the sub-station?

A. I am afraid that I cannot answer that question.

Q. You don't know?            A. No, sir.

Q. From your knowledge as an electrical man, was it possible [205] by construction to have killed all of the power in that sub-station?

Mr. Anderson: I object to any further testimony by this witness concerning this question just asked, I think I can see what he is getting at. I object until it is first established that the Union Pacific either owned or operated this sub-station, otherwise there is no connection.

The Court: The objection is overruled, I think there is some evidence in the record now.

(Testimony of Harold W. Rising.)

Mr. Racine: I will ask that question again and possibly reframe it a little.

Q. Was there a method of construction to have so constructed that sub-station so that the pole-top switch would cut off all the power coming into the station?

Mr. Anderson: We object to that as not within the issues of this case and there is no connection whatever with the railroad.

The Court: I cannot say at this time, the objection is overruled.

A. It would have been possible by construction to have accomplished that purpose in two different manners; one of which would have been to have tied in the lightning arresters on the load side of the disconnect switch,—the other would have been to put the lightning arresters [206] outside of the sub-station as they now are.

Mr. Anderson: I move to strike the last portion of that answer as something that has occurred since this accident.

The Court: Something that happened since, yes, the last part in regard to the change since the accident will be stricken.

Mr. Casterlin: And will the Court caution the witness as to any further statements?

The Court: I think he understands it now. However, I will say that anything that happened since the accident should be eliminated from your testimony.

Q. Mr. Rising, at the time you inspected the

(Testimony of Harold W. Rising.)

sub-station do you have an opinion as to whether or not that sub-station, as it existed, was hazardous?

Mr. Anderson: We object to that as not within the issues and certainly it is not binding on this defendant.

Mr. Racine: I understood that the witness had answered in a measure that he had pointed out some hazards on the exhibit.

Q. I will add to the question as shown by the exhibit, do you have an opinion as to whether this sub-station was hazardous at the time you inspected it? [207]

Mr. Anderson: We object to that as calling for a conclusion of the witness.

The Court: He is an expert, he may answer.

Mr. Anderson: If I may add to the objection it is not justified by the pleadings and it is not shown that the railroad operated the sub-station.

The Court: He may answer.

A. Yes, sir.

Q. And what is your opinion?

Mr. Anderson: Now, I would like to renew my objection. It seems they are trying to go backward on this matter, looking at it from circumstances that resulted from the accident rather than what actually would be the prevailing situation.

The Court: He may answer.

A. It is my opinion that the 12,500 volt conductors within reach of any person who might be inside the enclosure, whether authorized or otherwise would be hazardous.

(Testimony of Harold W. Rising.)

Q. What other matters did you observe with regard to the exhibit, if any, that would make the situation hazardous?

Mr. Anderson: I would like to have the same objection to this question.

The Court: Very well, and the same ruling. [208]

Q. You hesitate, Mr. Rising, perhaps you didn't understand my question. Why is it hazardous, as you understand it?

Mr. Anderson: And I would like the same objection to that question.

The Court: The same ruling.

Mr. Anderson: And if the Court please, we are not charged with hazardous construction of that sub-station. We are charged with furnishing electricity to the sub-station and also by allegation, operating the sub-station, of which there is no evidence.

The Court: Paragraph four, I think, covers it, he may answer.

A. If I understand your question correctly, my answer would be that these conductors energized at 12,500 volts between conductors would be hazardous to any person who might be working inside of that area, because they might, either through lack of knowledge or misunderstanding or through accident come in contact with them.

Q. What, in your experience, is done to correct such a situation?

Mr. Anderson: Now, we object to that, we are talking about an event that has happened, some-

(Testimony of Harold W. Rising.)

thing that previously happened. In other words, they are trying to determine reasonable care after the event.

The Court: Confine your testimony to [209] what could have been done prior to the accident to prevent it.

A. It is the general practice where this type of arrester is used, or a similar type, to mount them on a high pedestal or to put them beyond reach, and beyond accidental contact. The safety code also provides that there shall be barriers where such conditions do exist.

Q. And does that code provide for barriers in addition to the barrier around the sub-station itself?

A. Yes, sir.

Q. What is the practice in the electrical industry as to the markings within the sub-station to indicate the various matters regarding the switches and equipment carrying voltage?

Mr. Anderson: May it be agreed that we have objections to all of this line of testimony?

The Court: I don't like to take an objection of that kind because I may not understand whether the witness is still testifying on the same subject or not. You may renew your objection and as to this I will make the same ruling now.

A. Where hazardous conditions exist generally it is the practice to post warning signs. I don't know that it would necessarily apply inside the enclosure of a sub-station.

(Testimony of Harold W. Rising.)

Q. What is the fact with respect to switches, whether they are [210] open or closed?

A. Switches are required to be marked in such a way that will indicate whether they are open or closed.

Q. Mr. Rising, based upon your experience as an electrician and as an inspector, did this installation here, in the condition shown by the exhibit, and in the condition which you saw in January of 1951, comply with the ordinary safe and proper installation as to sub-stations of that type?

Mr. Anderson: We may have the same objection that I have made heretofore and on the same grounds previously urged?

The Court: Yes, you may, and your objection is overruled, he may answer.

A. I cannot state as to whether the switch indicated whether it was open or closed. As to the condition of safety there were no barriers around the hot conductors and they did come down within approximately three and a half feet of the ground, which would be not according to the custom.

Q. Are those conditions readily ascertainable and can they be observed by an electrician?

A. A qualified electrician who is familiar with sub-stations, using ordinary care probably would distinguish it, yes, sir.

Mr. Racine: You may inquire. [211]

### Cross Examination

Q. When you inspected this sub-station on Jan-

(Testimony of Harold W. Rising.)

uary 18, 1951, you knew that it was a Pacific Fruit Express Company sub-station, didn't you?

A. I was directed to go to the Pacific Fruit Express Company sub-station and I went to that one.

Q. Now, if those disconnect switches above the lightning arresters had been pulled then the lightning arresters would have been de-energized?

A. Yes.

Q. And if that had been done, from what you have testified to, it would not have been considered an unsafe sub-station, particularly as to the plaintiff here, would it?

A. I would like to be sure that I understand your question.

Q. If all the power had been de-energized in the sub-station there would have been nothing unsafe, so far as the plaintiff, Mr. Johnson, was concerned?

A. At the time when the disconnect switches were pulled or open it would not have been unsafe, that is correct.

Q. So the question then probably was, if there was anything unsafe about it, it was the manner or the method in which it was operated, is that correct?     A. No.

Q. You said that if the power had been de-energized it would [212] have been safe?

A. That is correct.

Q. Now then, if the power had been de-energized it would have been a safe place for Mr. Johnson to work?     A. Yes, sir.

Q. So the pulling of the disconnect switches or

(Testimony of Harold W. Rising.)

the opening of the disconnect switches is a method of operation?      A. I would say so, yes.

Mr. Davis: Has the witness answered the question he said he did not understand?

The Court: Yes, all of the questions have been answered, I don't know whether he wants to follow that out or not.

Q. You would say this, would you not, Mr. Rising, if these disconnect switches leading to the lightning arresters had been pulled, LaVerl Johnson would not have been injured?

A. Yes, sir.

Q. That is correct, is it?

A. Yes, sir.

Q. So there would have been no danger in the sub-station at all?

A. As of that time, none.

Q. That is the only time that we are concerned about, isn't it?      A. Yes, sir. [213]

Q. This sub-station has a fence around it, doesn't it?      A. Yes, sir.

Q. That is the usual and customary practice?

A. Yes, sir.

Q. I suppose that any sub-station is dangerous to the uninformed, isn't it?      A. Yes, sir.

Q. Is that the one reason why they keep them lock up?      A. Yes, sir.

Q. Did you investigate enough to find out that there was a cutoff switch on the Pacific Fruit Express Company line from the sub-station over to

(Testimony of Harold W. Rising.)

where it connects on the so-called Batiste power line?      A. No, sir.

Q. You did not investigate that?

A. No, sir.

Mr. Anderson: I believe that is all.

### Redirect Examination

Q. (By Mr. Racine): Mr. Rising, would it be customary and safe and proper for a non-electrician to operate the pole-top switch or the disconnect switches in that sub-station?

A. It would be safe to operate,—do you mean the pole-top switch?

Mr. Racine: Would you read the question, [214] Mr. Reporter?

(Question read by the reporter.)

A. It would be safe to operate the pole-top switch but it would not be proper because no one but a qualified person should enter that sub-station except in company with or in the company of an under the supervision of a qualified person. As far as the cutout switches are concerned I would not consider it safe for anyone but a qualified person to operate them.

Q. If a qualified electrician had operated the pole-top switch and opened it, what would have been his duty in your experience as to the disconnect switches?

A. He should also have pulled the disconnect switches.

Mr. Racine: That is all.

Mr. Anderson: I have no further questions.

ELMER V. SMITH

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Davis): You are a resident of Pocatello, Mr. Smith? A. Yes, sir.

Q. And you have a family, do you?

A. Yes, sir. [215]

Q. How long have you lived in Pocatello?

A. Almost continuously since 1917.

Q. What is your business or profession?

A. Electrician.

Q. How long have you been an electrician?

A. My first work was in 1907 and excepting for a short time during World War I, I have been continuously employed at electrical work or inspection.

Q. And were you in any electrical capacities in World War I? A. Yes, sir.

Q. And what was that?

A. In the 37th Engineers during World War I, in the United States and also France. In France I had charge of power lines, generating stations and sub-stations.

Q. Did you work in any electrical capacity or as an electrician during World War Two?

A. Yes, sir.

Q. During World War Two?

A. Yes, during World War Two I spent ap-

(Testimony of Elmer V. Smith.)

proximately 11 months in Alaska working on various voltage lines and numerous transformer installations. After 11 months in Alaska I spent several months with the Aluminum Company of America at Riverbank, California, on transformer installation. Following that I was on a tanker in the Pacific for two years and eight months. This tanker was equipped wholly [216] with alternating current. They had a sub-station of similar size and usefulness on the ship. I serviced that equipment and this ship as a whole and I stayed until 1946, in May.

Q. And what have you done since 1946?

A. I worked for contractors in Seattle, Washington, and these contractors were serving the Texas Company in the states of Oregon and Washington.

Q. And what type of work did you do there?

A. That was electrical work within the buildings and structures owned by the Texas Company; mainly low voltage work.

Q. Have you had any experience as a contractor and in your own business in the electrical line?

A. Yes, sir, in this town.

Q. And what business did you operate in this town and for how long?

A. The Main Electric on East Center from 1923 up to 1939.

Q. Have you had experience in constructing all different types of electrical high voltage lines, substations and general installations?

(Testimony of Elmer V. Smith.)

A. My experience has reached to 110,000 volts but not in excess of 110,000.

Q. Have you had experience up to that voltage in general electrical construction work, including construction of sub-stations? [217]

A. Yes, sir, I have, including sub-stations.

Q. Are you familiar with that type and class of work as an electrician?

A. I consider myself to be familiar with it.

Q. Are you familiar with the National Safety Code, what is generally called the Safety Code?

A. There are two codes, the Safety Code is one and the National Electrical Code for electrical construction is the other. I am more familiar with the National Electrical Code than with the National Safety Code.

Q. You have had occasion to make yourself familiar with it and to observe it and to work under the conditions it sets forth?

A. I have, on numerous occasions.

Q. Now, Mr. Smith, are you familiar with the state, that is with the Idaho minimum general safety standards and practices as adopted by the Idaho Industrial Accident Board?

A. I am familiar with it and I have referred to it frequently on the AEC installations.

Q. You refer to the AEC, what experience have you had in that?

A. On one project I was a journeyman electrician; on another I was foreman and on still an-

(Testimony of Elmer V. Smith.)

other project I was inspector for the Valo Nox Company.

Q. By the AEC construction you mean the construction that we [218] know as the Arco or desert construction?            A. That is correct.

Q. That is where you did that work?

A. Yes, sir, except previous to that I was at Hanford for about three months, that was also for the AEC.

Q. Now, did I ask you, Mr. Smith, how long you lived in Pocatello,—I guess I did?

A. No, but I came here first in 1917 and I lived here until I left during the war and then I returned in 1919 and I spent four years in Southern California after the war and returned here in 1923 and have been here most of the time continuously since, except for the periods that I was in the Pacific during World War Two and the time I was in Alaska and Seattle.

Q. Since 1923, have you had your own business or did you immediately after 1923 have your own business in Pocatello?            A. I did.

Q. Were you generally familiar as an electrician, with the general plan and the sub-stations and the distribution system of the Idaho Power Company in this town?

A. I was quite familiar with it, even more so after I became city electrician.

Q. How long were you city electrician?

A. Approximately two years.

Q. When was that? [219]

(Testimony of Elmer V. Smith.)

A. From early in 1939 until a month after war was declared in 1941.

Q. During that time, as city electrician, did you become familiar with the distribution system of the Union Pacific Railroad Company in distributing electricity in Pocatello?

A. No, I did not because at that time the city had no jurisdiction or at least conceded that it had no jurisdiction over the Union Pacific lines.

Q. Did you know, during that time, whether the Union Pacific Railroad Company did have a line or system of their own that they used?

A. Yes, I knew that.

Q. Were you familiar with the sub-station, a picture of which is set up here (indicating) as Exhibit No. 20?      A. At what time?

Q. At any time before November 4, 1950.

A. Only by passing in a car on North Harrison or North Main and observing it, you might say, out of the side of my eye.

Q. Just generally as an electrician would?

A. I had no interest in it, I just glanced at it.

Q. Calling your attention to Exhibit No. 20, have you familiarized yourself with it, and have you studied that picture?      A. Yes, sir.

Q. Were you here and did you hear Mr. Gilbert's explanation of [220] the matter and Mr. Rising's explanation of the construction and how it was set up?      A. Yes, sir.

Q. That was, in your opinion, a fair description, was it?      A. Quite clear but incomplete.

(Testimony of Elmer V. Smith.)

Q. Incomplete?

A. Quite clear and fair as far as it went but incomplete.

Q. Will you complete any part of that which in your opinion was incomplete?

A. There is another photograph which will show the north side of the transformer rack.

Q. Now, you have been handed an exhibit, what exhibit is that, Mr. Smith?      A. 17.

Q. Just go ahead with your explanation on that.

A. This Exhibit No. 17 is taken from the north side of the sub-station showing quite clearly the operating device for the pole-top switch. Along side of this operating device is a sign and it says: "Warning Disconnecter, Do not operate under load." On the left side of the sign it shows four arresters. On the right side of this sign and operating handle it shows three transformers and the metering equipment and shows the secondary bus. The point that I noticed mostly that they overlooked was the fact that this disconnecting switch was hanging vertical in [221] this photograph. You cannot tell from the position of the handle or the position of the mechanism it is connected with, whether it is on or off.

Q. What is the objection, from an electrician's standpoint or from the code, what should the condition be?

Mr. Casterlin: I think the defendant will object to this on the ground that it runs to a construction which has already been completed and into which

(Testimony of Elmer V. Smith.)

power, from some source, is delivered and there is no evidence in this case that the Union Pacific Railroad, this defendant, constructed this transformer site, and there is no allegation in the complaint that the injuries received by LaVerl Johnson, the plaintiff, resulted from the faulty construction or the construction of the transformer and its condition, the only allegation is that this defendant is charged with negligence in the furnishing of electrical energy and the operation of an electrical sub-station. This line of testimony runs to the original construction and they are trying to show by this, that the sub-station is faulty in its construction, and the fact that the sub-station is faulty in its construction has no relation whatsoever to the furnishing of electrical energy or the operation of it; that the operation of this sub-station in the condition in which it was, was faulty or caused the injury. Now, there is a distinction between [222] the operation of a faulty installation and the construction of a faulty installation, that is the point that I wish to object on.

The Court: I think it is all covered by the allegation, the objection is overruled. He may answer.

Q. Do you have the question in mind, Mr. Smith?

A. I would rather have the question read again, if I may.

(Question read by the reporter.)

A. I will continue with my answer, an electrician,—his objections would be that unless a switch

(Testimony of Elmer V. Smith.)

is so marked as the safety code calls for, that there is some risk and hazard, and furthermore not being locked and it is arranged for locking,—not being locked at the time I saw it would be an additional hazard, but on the other hand it could be easily discerned by an experienced person if at such a time they were checking the fuses on the metering devices or reading the meter; they could easily see that the pole-top switch did not operate the disconnecting device for the arresters.

Q. Just a moment, Mr. Smith, if I may interrupt you a second. What is the duty of one furnishing and conveying electricity to another, or a customer, upon observing a condition such as you have described there, or upon observing a dangerous condition with reference to the continued furnishing of it [223] under such conditions.

Mr. Anderson: We object to that, if the Court please, that is a question for either the Court or the jury. It calls for the conclusion of the witness.

The Court: I think the question is poorly framed but he is an expert and I would permit him to give his opinion on it.

Mr. Anderson: They are asking him a question of law, your Honor.

Mr. Davis: Would the Court like me to reframe the question?

The Court: I think you should. I think your question should only go to what his opinion is.

Mr. Davis: Very well.

Q. Mr. Smith, basing your answer now upon the

(Testimony of Elmer V. Smith.)

condition that you have been describing there, from the exhibit and based upon your knowledge as an electrician and upon your knowledge of the National Safety Code, have you an opinion as to what the duty of one furnishing electricity under those circumstances,—yes, I will leave it that way, as to what would be the duty of one furnishing electricity under those conditions,—have you an opinion?

The Court: You may answer that question yes or no. [224]           A. Yes.

Q. And what is your opinion as an expert?

Mr. Casterlin: If the Court please, we object to this question on the ground that it is invading the province of the jury and the province of the Court. The allegation in the complaint is that the defendant violated the rights of the plaintiff and this witness is asked in substance and effect, if the defendant has violated that duty. He is not being asked the question which I think counsel intended to ask him. He has asked the question whether or not he has, that is, the defendant has violated that duty, which necessarily involves the inference that it owes a duty in that respect and has violated it and that invades the province of the Court and the jury and attempts to pass or passes upon the merits of the allegations of the complaint.

The Court: I take it the only way the jury or the Court or anyone else could get any information on this matter is from the opinion of experts. There would have to be some foundation for the jury to pass up on the question that would be submitted

(Testimony of Elmer V. Smith.)

to them. The only way I know of that they could get that information would be from physical conditions and from opinions of experts. This man is qualified as an expert. There is only one part of the question that possibly should be eliminated and that [225] is the safety code, because the safety code is not in evidence. I will let him answer.

A. My opinion in this is,—I don't know whether to use the word "duty" or "practice". But in my observation over previous years, the power companies and other distributors of electricity will not, knowingly, and if it is within their knowledge, deliver electricity to hazardous installations; the principal purpose of that is to protect their other equipment ahead of it. In other words, in this case, the Batiste Springs Power Line and Water Supply depended upon the same circuit so it strikes me that they would hesitate, or should hesitate to supply current to a hazardous installation.

Q. Now, Mr. Smith, calling your attention to Exhibit No. 20, was that installation as shown by the picture,—by the exhibit, which shows the conditions as of November 4, 1950, have you an opinion as to whether or not that is a hazardous installation? A. Yes.

Q. Have you an opinion, Mr. Smith, as to whether or not that is a proper installation?

A. Yes.

Q. Have you an opinion, Mr. Smith, as to whether or not that installation conforms with the

(Testimony of Elmer V. Smith.)

general practice of those distributing or furnishing electricity through such sub-stations? [226]

A. I have such an opinion.

Q. Mr. Smith, give us your opinion as to what is hazardous about the construction of that sub-station as shown in Exhibit No. 20.

Mr. Casterlin: That is objected to as no proper foundation is laid in this case in which the Union Pacific Railroad Company is the defendant.

The Court: The objection is overruled.

A. I would like to show you with the exhibit.

The Court: You may step down there.

A. The numerous hazards here were,—I don't know where to start, but the first hazard I noticed approximately one or two minutes after entering the gate. The first hazard upon entering the gate, that I noticed, was the fact that bare conductors were very much in evidence within six feet and six inches of the ground and long before a man approached the disconnect he is going past these hot conductors. He has to turn to the left and again to the right and travel a distance of approximately 30 feet before there is any possible chance of de-energizing any portion of this sub-station and anyone not highly experienced would be traversing that great an area before there was any possible chance of disconnecting the current. My first impression was that no person should enter the sub-station, [227] that is, its inclosure from the west side, the gate should be properly on the north side immediately opposite the disconnect switch and the meter-

(Testimony of Elmer V. Smith.)

ing device and without such prior arrangement it would have been much safer and much better that this line be de-energized elsewhere; either at its source or the junction of the Batiste Springs Line. Then after you do reach the disconnecting device, it is not labeled which way to twist this handle to turn it on or which way to turn it off. It is arranged to be locked either in the open position or the closed position but to my observation there was no pad-lock there at the time that I saw it. The sign alongside this disconnecting switch called a disconnecter,—it is a pole-top switch operating the three pole areas of the line simultaneously with this iron handle below, which is grounded, the iron handle is considered safe because it is a well grounded construction but this disconnecter does not state clearly that it turns off all of the equipment in the substation, it merely leaves the inference that this connector does the work, but I immediately saw when I looked up that this line here, coming down through here (indicating) to the arrester,—this line tapped here and this third line tapped here,—it took me less than a minute to observe that.

Q. Mr. Smith, all of that is shown by this picture? [228]

A. That is shown by this picture quite clearly. Those three wires going to the lightning arrester are not connected to the disconnecter switch, the one shown on the side. The one that has the sign on it inferring that it disconnects current. Now, any person operating that disconnect switch with any

(Testimony of Elmer V. Smith.)

knowledge, any experienced person about to enter this inclosure should by all means obtain a hot-stick and disconnect these three connectors ahead and above the lightning arresters. Now, in the event that is not done, the inclosure is not safe for another reason, because arresters of this type should have an inclosure within the inclosure, even experienced persons should not be permitted to come close to these arresters in making repairs or adjustments or even reading meters.

Q. Mr. Smith, are these things that you are calling attention to,—are they ascertainable or discernible to any qualified electrician?

A. Yes, sir, to a qualified electrician.

Q. What do you say, Mr. Smith, as an electrician, as to whether it would be the customary practice for anyone,—any layman not qualified as an electrician to enter that sub-station to pull the pole switch or any other switch?

A. Entering that sub-station with the energy of 12,500 volts,—

Mr. Casterlin: May we have our objection [229] to that question?

The Court: Yes, and the same ruling.

A. Entering that sub-station with that much energy is hazardous to any person, experienced or inexperienced person, until such time as that pole switch is operating, then it is still hazardous after they get around on the other side where the arresters are. An experienced person, to do any work in this, under the regulations generally enforced

(Testimony of Elmer V. Smith.)

by electrical workers, one person never works alone on a 12,500 volts.

Q. Do you have an opinion as to whether or not it is proper or was proper with the conditions as shown on Exhibit No. 20 for anyone, qualified or unqualified, to enter that inclosure alone. Do you have an opinion?

A. Yes, sir, I have an opinion.

Q. And what is that opinion?

A. That opinion is that no person should be alone on entering that inclosure.

Q. And do you have an opinion as to whether it is customary for people who are not qualified as electricians to enter such inclosure as that?

A. I have an opinion.

Q. And what is that?

Mr. Casterlin: To which we renew our objection and also on the additional ground that we are not [230] interested with custom but with the fact as it was here.

The Court: He may answer.

A. The only time an inexperienced person should be permitted in that inclosure is in company with a qualified person, one definitely qualified in high voltage.

Q. Mr. Smith, do you have an opinion from your experience as an electrician what the general custom and practice of a conveyor of electricity or one furnishing electrical energy such as furnished through this sub-station here to the Pacific Fruit Express Company,—do you have an opinion

(Testimony of Elmer V. Smith.)

as to what would be the ordinary custom and practice, upon an electrician observing the conditions that existed there?

Mr. Anderson: Now, that has been answered, he has gone into great detail on that in answering another question and we object to its as repetitious.

The Court: Well, I am not sure whether he did or whether he did not, I think he did but I will let him answer.

Mr. Davis: I was afraid, your Honor, that that portion was not gone into, I was afraid that his answer went to that one particular switch and I didn't want the question raised that this was not in the record.

The Court: He may answer.

Q. Do you have an opinion? [231]

A. I have an opinion.

Q. Give us that opinion?

Mr. Casterlin: Now, we renew our objection.

The Court: The same ruling.

A. Will you phrase that question again so that I can get it sure?

Q. What I am asking is what the general practice would be in the electrical industry of one who was furnishing, who was selling electricity through such a sub-station as that, under such conditions when they observed them or if they did observe them, as to whether they would continue to furnish the electricity? A. In my mind,—

Q. I want your opinion, Mr. Smith?

A. In my opinion it is incorrect to continue to

(Testimony of Elmer V. Smith.)

supply current under known hazardous conditions.

Q. What makes you say that?

A. Because, as I said before, they hazard their own equipment, the operation of the equipment by tying on to lines.

Q. But what about hazarding lives and property?

A. Well, any hazard is still a hazard, whether it is on this line or the Batiste Springs line,—it is still a hazard to lives and property.

Q. What is your opinion as to the duty of one who furnishes electricity to another for pay, when they observe such [232] condition as existed at the time and place where the electricity is metered?

Mr. Anderson: We object to that as repetition, certainly that has been answered.

The Court: I will let him answer.

Mr. Casterlin: There is another question, I doubt that the foundation has been laid for this kind of question.

The Court: I think sometimes the witness has some difficulty in remembering the questions or possibly in understanding them, but I will let him answer.

A. Yes, I do know what the question was and so far as the duty is concerned I would say that it is the duty to refuse, it is their duty to refuse to continue to furnish electricity under known hazardous conditions.

Q. And that, as shown on the exhibit would be a known hazardous condition?

(Testimony of Elmer V. Smith.)

A. I would say so, it is quite apparent.

Q. Do you think that you have pointed out the different hazards as shown by the exhibit?

A. There are more hazards there but it is rather hard to show them all. The 12,000 volts come down these three cut-outs, approaches the transformer at the same elevation that the 2300 volts leaves the transformer and the wires are bare [233] within six feet six inches of the ground, although that isn't so expressly apparent as the wires that lead to the lightning arresters.

Q. Mr. Smith, have you an opinion as to whether or not, taking the condition as it existed when this picture was taken November 4, 1950, whether that installation as shown there is a standard or proper installation in this particular community and in the city of Pocatello, do you have an opinion?

A. Yes, I have an opinion.

Q. And what is your opinion as to that?

Mr. Casterlin: We object to that on the ground that it is a double question. First as to whether it is a standard installation and, second, as to whether it is proper, and in addition we object to the expression of an opinion on the ground that has heretofore been stated.

The Court: He may answer.

A. The arresters by all means are not standard equipment; they were virtually abandoned by power companies in the 1920's. I don't know whether it was in the early '20's or later in the '20's. The only time I ever knew of them being re-used other than in

(Testimony of Elmer V. Smith.)

this case was when they were purchased from one point, and the entire thing, transformers and arresters, were moved to another point, the whole thing moved in its [234] entirety,—it wasn't an original purchase. Along in the '20's, about '27, the pellet type of arrester came into use and since then I don't know of any company that ever sold this type of arrester.

Q. Was it proper, in your opinion at that time to continue to furnish electricity in this amount and of this voltage of current under those conditions with that arrester or arresters, in November of 1950?

Mr. Anderson: We object to that as repetition.

The Court: He can just answer it yes or no, I believe.

A. No. I would like to make that clear, if I may.

The Court: Yes, go ahead.

A. The reason I say it is not proper is because the installation, the method of installation was more hazardous than the arresters themselves.

Mr. Davis: I think that is all.

The Court: We will recess at this time for 15 minutes.

November 23, 1953, 3:00 o'clock p.m.

### Cross Examination

Q. (By Mr. Anderson): Mr. Smith, if those disconnect switches leading to the [235] transformers had been disconnected before the plaintiff, Mr. Johnson, had gone in there then it would have been

(Testimony of Elmer V. Smith.)

safe and Mr. Johnson would not have been injured, that is correct, isn't it?

A. No,—you said the transformers and I don't believe that you meant the transformers.

Q. I meant to say arresters,—if the disconnect switches had been pulled, leading to the arresters, then Mr. Johnson would not have been injured, would he?

A. Well, I cannot state exactly whether that would be the final culmination.

Q. Would it de-energize the lightning arresters?

A. Yes, but the question is how to de-energize the lightning arresters.

Q. By pulling the disconnect switches?

A. Yes, but how would you pull them, certainly not with your fingers.

Q. Certainly not, I would not and you would not pull them with your fingers, but irrespective of how they could have been pulled, if they had been pulled then Mr. Johnson would not have been injured, he would not have received any injuries, is that correct?

A. I presume that would have been the final result, yes.

Q. You know that to be a fact, don't you?

A. Yes, in other words, if there was no energy in the sub-station [236] whatsoever then it would have been certainly safe, yes.

Q. If the gang switches were off to the transformers, which apparently they were, and those disconnect switches were off to the lightning arresters,

(Testimony of Elmer V. Smith.)

then there would have been no energy in the sub-station, would there?

A. Not within reach of the average person, no.

Q. And that being a fact then the sub-station would have been safe for him to work in, wouldn't it?

A. Only at the elevation that he would not have been able to reach the current.

Q. Where would he have had to reach then,—clear up to the top of the sub-station if those things had been de-energized?

A. He could have climbed up any part of the structure and reached hot wires.

Q. Yes, if he had climbed up far enough, but for the purpose of working around the transformers or even the lightning arresters they would have been safe if all of these switches had been pulled around there?

A. Providing he remained on the ground.

Q. Now, Mr. Smith, point out to me where, on this Exhibit 20, where the disconnect switches are, to the lightning arresters?

A. This one here, here is another one and here is the third (indicating). [237]

Q. How high are they above the ground?

A. Approximately 12 feet.

Q. Then he would have to climb up to that, to get above that to become entangled with live wires?

A. That is correct, providing this pole-top switch was open.

(Testimony of Elmer V. Smith.)

Q. We are assuming that the pole-top switch was open?

A. He would have to climb to that point, after those were disconnected.

Q. Below those disconnect switches there would not be,—if all of the switches were pulled, there would not be any electrical energy at the transformer or lightning arrester?

A. That is right, assuming those were open.

Mr. Anderson: If the Court please, I now move to strike all of this witness's testimony on direct examination as being incompetent, irrelevant and immaterial for it now appears definitely that the sub-station was safe enough if it had been operated properly.

The Court: The motion to strike will be denied.

Mr. Anderson: That is all.

### Redirect Examination

Q. (By Mr. Davis): You have been interrogated as to a switch, if the switch had been pulled,—now, what is the standard of practice where a person would enter the sub-station and see the [238] pole switch pulled, what would that person have a right to believe and expect?

A. My first assumption,—

Mr. Anderson: That is entirely repetition, that was all gone into before and it is making this man the judge of someone else.

The Court: I will let him answer.

A. My first assumption when I saw that switch

(Testimony of Elmer V. Smith.)

from outside the gate, the first time I ever saw the sub-station a short time ago,—this disconnect switch as it is called on the side, is intended to disconnect all of the equipment in the sub-station.

Q. I am asking you to refer to the picture, to the exhibit,—I want your testimony based on Exhibit No. 20. Under the custom and practice of electricians or of anyone else, if anyone entered that sub-station and saw the pole switch pulled or open, what would they, under the ordinary custom, have a right to expect as to the energy in that sub-station?

A. That is to be expected in cases of this kind,—that the disconnecter is for that purpose,—to disconnect all of the equipment in there. I would expect it unless I was cautioned beforehand and then, of course, I would look further, the first impression is that the disconnecter would turn off all of the electricity.

Q. The ordinary standard is, if a man entered there that day, [239] at the time that the picture shows the conditions, and if he saw the pole switch open, he would have a right to believe that all of the energy was out of the sub-station, the lightning arresters and everything else, wouldn't he?

Mr. Anderson: We object to that, that is assuming a great deal and making this man the judge of someone else's ability.

The Court: He may answer.

A. Yes, I would assume that all of the electricity would be off if the pole-top was open.

(Testimony of Elmer V. Smith.)

Q. Now, Mr. Smith, your attention on cross examination has been called to the fact that if all of the switches were pulled that it would be 12 feet to a live wire of 25,000 volts?

A. 12,500 volts.

The Court: But that is not an absolute fact, because we know from the evidence that all of the switches were not pulled, there was electricity in the lightning arresters, so we are talking about questions on both sides here, that do not apply.

Mr. Davis: I beg the Court's pardon.

The Court: Go ahead. I was only referring to questions that have been asked by both sides, and that is, if the electricity was all out of this equipment and, of course, we know that it was not all out.

Q. Mr. Smith, in your opinion is it safe practice and was it [240] safe practice, even if all of the switches had been pulled, to have permitted a condition to exist where a person could if he climbed 12 feet, could have touched or taken hold of a 12,500 volt line?

Mr. Anderson: Now, if the Court please, that begs the question there is nothing to support such an assumption.

The Court: He may answer but I think myself that we have had a lot of questions here that do not apply to this case and I am not referring to either one side particular, I am referring to both.

A. In the first place it is not safe for an inexperienced person to go in there alone, if there is

(Testimony of Elmer V. Smith.)

energy there at all an inexperienced person should not go in alone.

The Court: I think that has been answered a good many times.

Mr. Davis: That is all, Mr. Smith.

### Recross Examination

By Mr. Anderson:

Mr. Anderson: All I want to do now with this witness is to clear up what your Honor has stated is apparent.

The Court: Go right ahead.

Q. If there had been no energy and if all of the switches had been pulled then it would be a safe place for this man [241] to have been, would it not?

The Court: Now, Mr. Anderson, it seems that you are basing that on some remark that I made, I am not the one to decide this, the jury is, if they decide that the man could have been injured without any energy in the sub-station then that is all right.

Mr. Anderson: I was asking that as a question of the witness.

The Court: Yes, but I thought you were basing it on some remark that I had made.

Mr. Anderson: I will ask this again.

Q. That is a fact, isn't it, if all of those switches had been pulled in there, in that sub-section, LaVerl Johnson would not have been injured, would he?

A. Perhaps not, but I wouldn't have worked myself, even with my experience.

(Testimony of Elmer V. Smith.)

Q. You have answered my question, he was down around the lightning arresters, if he was there and all of the switches had been pulled in the substation, he would not have gotten a charge of electricity, would he?

A. Under normal conditions, no.

Q. Why did you qualify the answer?

A. Because, if he had his back turned and someone else came in that cage and turned that switch without his knowledge, he would have been electrocuted. [242]

Q. Well, let's not assume something now that has not been established.

The Court: I think we are chasing shadows, if he hadn't gotten in contact with the electricity, of course, he would not have been injured.

Q. And if it had all been turned off he would not have gotten in contact with any electricity, would he?      A. The same answer to that.

Mr. Anderson: That is all.

Mr. Davis: I think that is all.

### HAROLD A. SHOUP

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

#### Direct Examination

Q. (By Mr. Davis): Mr. Shoup, you were, on November 4, 1950, and for some four or five years before that the superintendent of the Pacific Fruit Express Company at Pocatello?

(Testimony of Harold A. Shoup.)

A. Yes, sir, I came here in September, 1949.

Q. You were served with a subpoena in which you were requested to bring the form of billing or the billing from the Union Pacific Railroad to the Pacific Fruit Express Company covering the purchase of electricity for the month of November, 1950?

A. That is right and I didn't have them in my possession. [243]

Q. They are in the possession of counsel for the Railroad?     A. That is right.

Q. Mr. Shoup, from whom does the Pacific Express Fruit Company purchase its electricity that it uses in the plant?

A. From the Union Pacific Railroad Company.

Mr. Davis: May I see that billing that you showed me before, Mr. Anderson?

Mr. Casterlin: That is the one that you say you saw before?

Mr. Davis: The one that I saw today.

Q. Do you know whether or not that is a bill received by the Pacific Fruit Express Company from the Union Pacific Railroad Company or not?

A. Yes, sir, it is.

Q. And did that ever come to you?

A. Yes, that is my signature for approval for distribution of accounts.

Q. Was that bill or statement paid?

A. I cannot answer that question.

Q. You don't know?     A. No, sir.

(Testimony of Harold A. Shoup.)

Mr. Davis: I think that counsel has seen this, and we offer the exhibit in evidence now.

Mr. Casterlin: And what is the number of that?

The Clerk: That is No. 21. [244]

Mr. Anderson: We have no objection but I would like, rather than introduce the original to introduce a photostatic copy, these are original records of the auditor——

The Court: It may be admitted and then it may later be withdrawn and a photostatic copy used in place of it, that may be done at any time.

Q. Do you,—please strike that, Mr. Reporter—during the time that you were superintendent did you receive regular billings such as this, monthly?

A. Yes, sir.

Mr. Davis: That is all.

### Cross Examination

Q. (By Mr. Anderson): You merely approved the bill and sent it to your office in San Francisco?

A. Yes, sir.

Mr. Anderson: I guess that's all.

Mr. Davis: That is all, Mr. Shoup, thank you.

Mr. Davis: If the Court please, I now offer Plaintiffs' Exhibits 23 and 22. I say 23 first because Exhibit 22 is a supplemental order. The two exhibits are general orders of the Public Utilities Commission of the State of Idaho, they are certified copies, as to the [245] adoption of the Bureau of Standards hand book with reference to electricity. Exhibit 22 is a supplemental order to that. I offer

both of these exhibits at the same time because they both pertain to the same thing.

The Court: Is there any objection.

Mr. Anderson: We have had no time to study these but we do object on the ground that they pertain to no issues in this case, and nothing that could be binding on the defendant here, we also object on the ground that they are incompetent, irrelevant and immaterial.

The Court: It is hard for me to say at this time so I will admit them and if it develops later that they are not connected in any way in this case I will strike them.

Mr. Davis: We will not read these or hand them to the jury until they are definitely admitted into the record. I now offer in evidence Plaintiffs' Exhibit No. 24 which is the National Bureau of Standards hand book H32 referred to in the exhibits which were just introduced in evidence which contains the certificate from the Secretary of the Public Utilities Commission with their seal attached setting out that this book contains the rules and regulations referred to in their orders.

Mr. Anderson: We certainly haven't time to [246] go through and read the entire book and we do object to it as being incompetent, irrelevant and immaterial.

The Court: I believe the book is admissible and I will admit it and if there is any reason later why you should make a motion to strike and I feel your motion should be sustained I will strike it.

Mr. Anderson: It is understood that my objec-

tion made to the previous two exhibits goes to this one, your Honor.

The Court: Yes, that is understood and the same ruling.

Mr. Davis: I offer in evidence at this time Exhibit No. 25 which is provided for by the statutes of the State of Idaho and is the Idaho Minimum General Safety Standard Practice as adopted by the Idaho Industrial Accident Board on the 27th day of April, 1950, having to do with outdoor construction, operation and maintenance of electric wires and equipment of the electrical industry. It does have a name there where one of the attorneys wrote on it that it was a part of the Johnson file and it was addressed and is addressed to Mr. Phillips, of course, if there is any objection to that it can be covered or in some other way not included.

Mr. Anderson: This exhibit, like the previous ones does have many things that have nothing to do with this [247] case——

The Court: ——I will admit it at this time but I am of the opinion that it perhaps is a matter for instructions by the Court. If it is provided for by the Statutes of Idaho then, of course, the Court will take judicial knowledge of it and instruct the jury. I will determine later whether it should be stricken and the matter taken care of by instructions.

Mr. Racine: I think it has been agreed, if the Court please, that we may stipulate that the life expectancy tables as shown in Volume III, page 380, of the Idaho Code, the American experience table may be applied to this case and to the age of

LaVerl A. Johnson at the time of the injury and it is stipulated that whatever that table may show as the life expectancy as of that age, would be agreeable.

Mr. Anderson: That is right.

The Court: Then it is so stipulated.

Mr. Anderson: I am stipulating to what the table shows, I am not familiar with what it shows.

The Court: That is right and you lawyers may get together and figure that out.

Mr. Racine: I believe it is 40.17 years.

The Court: Forty years and .17 years, then that is what is agreed upon? [248]

Mr. Racine: That is right, that is what the table shows.

Mr. Casterlin: And that is what we stipulate to, nothing further than that.

### LAVERL A. JOHNSON

having heretofore been duly sworn, testifies as follows:

#### Direct Examination

Q. (By Mr. Racine): Mr. Johnson, you have been previously interrogated and questioned to some extent regarding the events of November 4, 1950. Now, with reference to that day I will ask you whether or not you observed any person in the sub-station just south of the Pacific Fruit Express ice plant on that day, prior to your injury?

A. I did.

Q. Who did you observe in there?

A. I saw Mr. Johnson,—that was Mr. Howard

(Testimony of LaVerl A. Johnson.)

Johnson and another fellow, I didn't know who he was or is.

Q. Mr. Johnson, did you observe how he arrived at the plant that morning?

A. Yes, he came in a pickup and it was marked "UPRR Maintenance".

Q. Prior to November 4, 1950, had you observed persons working around the sub-station?

A. Yes, sir, I had. [249]

Q. Prior to November 4, 1950, had you observed this truck or a similar truck to the one you described, present there?

A. Yes, sir, I have.

Q. Did you see anyone driving that truck during the day of November 4, 1950?

A. Yes, I saw this fellow get in and I saw him leave just prior to noontime.

Q. Was that the man that you had seen in the sub-station?      A. Yes, it was.

Q. Where else had you see him that day around the plant?

A. He had been all over the plant as far as I know.

Q. What had he been doing?

A. He had been taking the tops off these units, that is as far as I got, I didn't see what he did after he got the tops off.

Q. What units do you mean?

A. These transformers.

Q. Is it electrical equipment?

A. Yes, it is, the electrical transformers.

(Testimony of LaVerl A. Johnson.)

Q. LaVerl, after you were out of the hospital, after you had these various operations in the summer of 1951, what did you do then, that is, after the operations, insofar as care or any limbs that you were going to get, what did you do?

A. You mean that late summer? [250]

Q. Yes, that late summer or early in the fall, did you go any place?

A. Yes, I went to Boise to be fitted for limbs.

Q. And were you fitted for limbs?

A. Yes, I was fitted for limbs and sent to this Elks Convalescent home to learn how to use them.

Q. How long were you up there?

A. I was there just a week then.

Q. Did you have any difficulty while you were there insofar as the legs were concerned?

A. Yes, I developed sores on the stumps,—I wasn't able to use them at all and I just more or less sat around and spent my week. At least only one day it was that I had them on and from that time on I just spent my time there.

Q. Did you later go back to all to learn to use them?      A. No, I haven't.

Q. What is the fact as to whether since you have had your limbs, that you have had any difficulty insofar as using them steadily. Will you please explain to the Court and jury what the fact is as to your use of them?

A. Well, constant use,—I have not been able to use them constantly. They develop sores and they swell up and they require soaking in warm water

(Testimony of LaVerl A. Johnson.)

to bring the swelling down and to take out the soreness. At various times there have been infections at different places and areas developed on [251] the legs, requiring me to take the limbs off,—even at times when I have them on I am unable to control them to the extent where I keep from falling down sometimes. At times I fall down and develop some pretty bad bruises from them.

Q. What were your hobbies before November 4, 1950?

A. Well, I was a Red Cross swimming instructor. I had taught swimming for the Red Cross at Downey and Lava Hot Springs and over here at Indian Springs Natatorium. I also liked to ski and I also hunt and fish, I did almost all outdoor activities, nearly all of such activities I participated in.

Q. Is the use of your legs painful to you now?

A. My legs,—the only time my artificial limbs are not paining me is when I have them off. There is pain there at all times when they are laced on, even while I am sitting I am sitting there in a bind and it is pinching.

Q. What special sox, if any, do you have to use?

A. We have what we call stump sox, it goes over the stump and it will progress about 14 inches, they are pure wool and they are quite thick, they are about \$4.00 apiece and they require a great deal of attention to keep them from shrinking, either hot or cold shrinks these things and I cannot use them after they are shrunk, I have to look after them a great deal on that point.

(Testimony of LaVerl A. Johnson.)

Q. Do you have any trouble with your clothing, your other clothing,—well, let me ask, do you have any trouble with [252] your clothing?

A. Yes, sir, all of my trousers,—I have tried to keep my legs from chewing them up, they are all lined with a very slick lining, a stiff slick lining, but even then my artificial limbs chew holes in the material very readily. That lining helps a little,—it slows it up but it seems to cut right through, several pairs of pants have been chewed up and suits and such.

Mr. Racine: If it please the Court, we don't want any question of impropriety here but we do feel that the jury are entitled to see Mr. Johnson and to see his condition. Perhaps it could be that the jury might be excused at this time for a few moments while we take this up with the Court.

The Court: Yes, the jury may retire.

(In the absence of the jury.)

Mr. Casterlin: I would like to make an objection to this demonstrative evidence at this time on the ground that the admission has been made, the defendant has admitted the loss of the two legs as described by the doctor, also the loss of the arm as described by the doctor; having so admitted and if it is not perfectly apparent we will now admit that that is the condition now as has been testified to by the doctor. Therefore, it becomes immaterial and unnecessary in this action to exhibit to the jury the [253] limbs or the stumps of limbs of the plaintiff and it can serve no purpose except to be the

(Testimony of LaVerl A. Johnson.)

means of creating sympathy which will enhance, enlarge and tend to increase the award, if any, which the jury might make. Sympathy being no part of the case, the circumstances being admitted and we see no useful purpose for the demonstration and we think it is unnecessary, and it has been so held by our State Supreme Court.

The Court: I would like to have the authority if I may, I have always understood that such a showing could be made.

Mr. Casterlin: It is in the case of Roy vs. The Oregon Short Line and it is reported in 55 Idaho at Page 404 and in 42 Pacific 476.

The Court: We will take a few minutes recess at this time.

(The following in the presence of the jury.)

Mr. Racine: If the Court please, we would like to show the jury how Mr. Johnson gets into his legs and have it explain what the equipment is, and what he has to have here. He will have to have some help from his wife. Now, you will go ahead, Mr. Johnson, and explain it to the Court and jury.

A. First of all, this is a stump sock that we are taking off. [254] However, to put them on it is just like pulling the skin apart, and then you put on this little job called a filler, it comes out this hole on the side to pull that stump into the socket and therefore securing it into the leg itself. Now, after you have your stump sock on and placed inside of the leg it is buckled up at the top here inside of this ring, that is called a ring, in fact, it is a ring.

(Testimony of LaVerl A. Johnson.)

It goes up to the upper portion of the body here (indicating) and takes the weight on the hip bones mostly, most of the weight is taken here (indicating). Double amputations like this, a bilateral is just too much weight, you can't shift the pain from one side to the other, and you just have to have the rings to take some of the weight off your stumps. Then we lace it up here, just lace it up like you would your shoe laces, right up to the top here; just lace it in to give you more bind, the more bind you can get away from your stump the better off you are at moving along, you have it laced up here and you are not taking all of the pressure against the stump. All of this friction takes more weight off, or direct pull from the stump. When this is laced up and buckled on with the leg in, then we have this little outfit here (indicating) and that comes up over here and my knee cap will stick out, ordinarily here,—right through here, between that cross, this comes up here and this belt goes completely around [255] my waist and it secures to both of these,—this is an elastic of some nature,—very heavy elastic and it is pulled out tight to give me some more pull to straighten the leg out, the elastic helps to straighten the knee out, every time I bend forward the weight bends it and the elastic pulls it back into position, so that I can take the next step, I guess that is about all about the legs,—then, of course, we have the arm here (indicating).

Q. Just a moment, now, LaVerl, can you very

(Testimony of LaVerl A. Johnson.)

well accomplish that by yourself without some assistance?

A. Well, yes, I can put the sock on, and I can place it in there, place the stump in there, that is, I can put it through loosely, I can attach it rather loosely but someone has to put the bind on it so that I can walk around without terrific pain. Someone has to come along to help me lace this up firmly. It would have to be very firm to keep this action down, they have to be almost solid.

Q. Now, go ahead with your description of the use of the arm?

A. Most people say that these aren't used very much. This one has had to have several repairs. This small cable has been replaced, I have replaced that cable and it is only about 18 inches long but the price of it is about \$6.50 for just the cable. These joints have had to be replaced, they break down frequently when they are in use. My webbing [256] has been replaced and it is nearly ready to be replaced again. To put the arm on requires more aid than I have with the one hand. This, I have very little control over, it hangs down or it can be locked up in one position at the elbow. The shoulder joint, I have no control over it whatever. I have a hook and the control of the hook as far as opening and closing it is done with the chest. You can just open and close the hook, it is just opened or closed as far as getting hold of anything is concerned, I have to put it in there to hold it, it doesn't grab very firmly, even then, at that time, when I

(Testimony of LaVerl A. Johnson.)

put anything in it. The only purpose that the arm has been for me is when I go to lift up something. I can lift with the arm until the arm itself gives away. It will break in a joint. It is just like lifting with my shoulder. Then we have one more small item that goes with this, that is this hand. There are very few occasions that you wear this, it is supposed to be very durable and to last a lifetime, but that is just what it is supposed to be, the skin is delicate, I have had to have the skin repaired,—and even then the repairs show up very plainly,—as I say, it is very delicate and very easily torn, in fact, you can rub the skin off, just rub it away, I guess that is the reason that they last a lifetime is because you are afraid to use them. To open and close the hand—it can be opened and closed, and with [257] all of the amputees that I have seen, that is about the extent of the opening, you can hold a small orange quite well and that is about it. You cannot carry an egg because you don't know how much pressure you are putting on there.

Mr. Davis: In view of the objection, I am not saying, of course, what should be shown but I think in justice here that the record should show that this man did not remove his shirt to show his arm or the stub end of the arm at any time, that he was simply showing how this apparatus worked, and at no time was any part of this man's, as I say, the stumps or the arm stump exposed.

The Court: The record may so show.

(Testimony of LaVerl A. Johnson.)

Is there any further questions, Mr. Racine, from this witness?

Mr. Racine: No, I think there is nothing further.

The Court: I would like to complete the examination of this witness this evening, if we could.

### Cross Examination

Q. (By Mr. Anderson): Mr. Johnson, will you tell me what other work you have done before you went to work for the Pacific Fruit Express Company?

A. Well, I have been employed by the Briggs Nursery as a landscape gardener. I have also been employed by Roland [258] Brothers Dairy on the wholesale pickup for milk, and I was employed at Eddys Bakery, I was a baker, and I was in the army.

Q. Were you also employed at the Naval Ordnance Plant?

A. Oh, yes, prior to going to the service I was employed at the Naval Ordnance Plant.

Q. All of this was prior to the time that you went to work for the Pacific Fruit Express?

A. Yes.

Q. What was the nature of that work, let us say at the Naval Ordnance Plant?

A. I was a laborer there.

Q. A laborer? A. Yes.

Q. What kind of work did you do?

A. Well, just general labor, we dug ditches and

(Testimony of LaVerl A. Johnson.)

repaired roadways for cement and things of that nature.

Q. What education had you had at the time of your injury?

A. Well, I had one semester at the University and I had graduated from high school.

Q. Out at the Pacific Fruit Express plant who were your immediate superiors or supervisors?

A. Mr. Shoup at that time and Mr. Johnson, Howard Johnson.

Q. Mr. Shoup, was the plant manager of the ice plant of the Pacific Fruit Express?

A. Yes. [259]

Q. And Mr. H. O. Johnson was his assistant, is that right? A. Yes, sir.

Q. Both of them worked for the Pacific Fruit Express Company, as you did? A. Yes, sir.

Q. And you got your pay checks from the Pacific Fruit Express for your wages, didn't you?

A. Yes, sir.

Q. Of course, you were not working for the Union Pacific Railroad Company?

A. Not at that time.

Q. And you never had worked for the Union Pacific? A. No, sir.

Q. Now, the ice plant out there, what does that do,—does that provide ice for the refrigeration of cars? A. Yes, that is right.

Q. Did you work in the ice plant itself, generally? A. Generally, yes.

(Testimony of LaVerl A. Johnson.)

Q. What were your duties there in the ice plant, —what did you do?

A. At the time I was repairman.

Q. As a repairman what did you do?

A. Well, we done just general repair work. I had been doing a little painting and I had been doing a little carpenter work and things of that nature. [260]

Q. Now, on that morning, just prior to your accident what did you start out to do,—say, first please tell me when did you go to work?

A. Eight o'clock in the morning.

Q. And what did you start to do?

A. When I first came to work I was prepared to work in the ice storage room at replacing the floor boards.

Q. Had you started that?

A. I had started.

Q. And how long did you do that?

A. It seemed to me until about nine o'clock, somewhere around there.

Q. And then what did you do?

A. Well, the lights went out and it was dark in there and so I came out; Mr. Johnson says, "I have been looking for you, I have a job for you."

Q. And what was that?

A. He told me to paint those leads coming into those transformers next to the building.

Q. That was there in the ice plant itself, or adjacent to it?

(Testimony of LaVerl A. Johnson.)

A. Right up against the building,—one side of the enclosure is the wall of the building.

Q. How many transformers were there in there?

A. I don't remember.

Q. Was there more than one? [261]

A. Yes, sir.

Q. You were painting the cables into the transformers or the leads into the transformers?

A. In and out, he said, "Paint all the bare wires", and that is what I was doing, that is what I was painting.

Q. They had taping or something of that sort on them, didn't they?

A. I don't even remember of them having any taping, there had been some wrapping of some kind on some of them but I don't know whether it was taping or not.

Q. When did you finish that job?

A. Well, that was just before noon.

Q. And then what happened?

A. I met Mr. Johnson, Mr. Howard Johnson; he came out there by that cage and he told me, "Here is the keys to the other cage and I want you to go and paint it just like you have this one."

Q. Paint the leads into the transformers?

A. He said, "Paint the wires like you have this one", and then I went to lunch.

Q. And then you later come back?

A. Yes, then I had to prepare the paint and everything and get ready to go to work and then I went to work.

(Testimony of LaVerl A. Johnson.)

Q. You took the key and went out and unlocked the gate to the large sub-station? [262]

A. He gave me the keys.

Q. Yes, he gave you the keys?

A. Yes, and I went out and unlocked this large sub-station and in order to keep the paint from rubbing on the wires that had been painted I was going to start from the back of the sub-station and work on out. I tested my first wire and that was the one that was hot.

Q. That meant that you went clear around,—after you came in the gate you went clear around the transformers to your left and back to the rear of the cage to the arresters? A. Yes.

Q. Those transformers, Mr. Johnson, you see them just as you come up to the front of the gate,—they are right in front when you open the gate, aren't they?

A. Yes, those transformers are in front of the gate.

Q. Now, is this the situation,—did Mr. Johnson, Howard Johnson, tell you to paint the wrapping on the wires that went to the transformers in the small cage first, that is, that you did in the forenoon?

A. No, he said to paint all of the wires that I could reach.

Q. All of the wires?

A. Yes, all that I could reach.

Q. You have been handed your deposition. Now, if you will turn to page 14 and I think at the

(Testimony of LaVerl A. Johnson.)

bottom of the page this question was asked: "But you were painting the wrapping around the [263] wires that went into the transformer?" and your answer: "The wires,—the wrappings had come off and they were bare, most of them. There was a few that was still hanging on very shabbily." That is correct, isn't it?

A. It showed signs that it had been there.

\* \* \* \* \* [264]

Q. It is a fact, isn't it,—and I call your attention now to your deposition given on April 29, 1953, which you have in your hand, that Mr. Johnson did tell you—I refer now to page 16 at the top of the page. This question was asked: "And what did he tell you to do over there?" Answer: "He told me to paint that one like I did the other one because it would be the only day that the power would be off." That is correct, isn't it?      A. Yes.

Q. I don't suppose that you paid any attention to the switches when you went into the sub-station?

A. No, I didn't.

Q. Those lightning arresters, they don't look like transformers as you knew transformers?

A. As I knew transformers, they were all transformers.

Q. You didn't know the difference?

A. I didn't.

Q. The lightning arresters in the big sub-station were nothing like the transformers, the leads of which you were painting in the ice plant sub-station that morning?

(Testimony of LaVerl A. Johnson.)

A. I thought a lead was a lead regardless of what it was hooked on to.

Q. I don't believe that you have answered my question; the lightning arresters in the sub-station look nothing like [265] the transformers over in the little station that you were painting the leads on in the morning. They were entirely different in character, were they not?

A. The machine itself was a little different but I thought probably different models.

Q. On your direct examination, when you first went on the stand the other day, you did say that you were instructed to paint electric cables into the transformers. What kind of cables were they?

A. Well, normally speaking they were just wires, but I thought that they were called cables.

Q. They had some wrapping around them, was that so?

A. Some of them did and some didn't.

Q. Mr. Johnson, have you told us who this man was that you saw in the transformer cage on the morning of the accident?

A. No, I don't believe so.

Q. Did you say that you saw some persons in the sub-station that morning?      A. Yes.

Q. One of them was Howard Johnson?

A. I don't believe that I ever saw Howard Johnson in the sub-station that morning.

Q. When was it that you saw him in there,—my first note right after you were recalled, you

(Testimony of LaVerl A. Johnson.)

said that you saw Mr. Howard Johnson and one other fellow in the sub-station? [266]

A. Howard wasn't directly in the sub-station, the other fellow was, Howard was right by him but he wasn't in the enclosure.

Q. Did you see them go in there?

A. No, I didn't see them go in.

Q. You saw them after they were in, did you?

A. I saw this fellow after he was in.

Q. That wasn't Howard Johnson?

A. No.

Q. Was Howard Johnson inside the enclosure at all?     A. No, not at that time.

Q. Did he go in later?

A. I don't mean right at that time, I never saw him within the enclosure that day at all.

Q. Who was it that you saw in the enclosure?

A. I don't know who it was in the enclosure.

Q. Did you see him do anything?

A. Well, I thought it was very odd because I saw him looking down into the top of one of those transformers.

Q. Was he standing on something?

A. Yes, sir.

Q. You don't know who he was?

A. Well, like I said, he had his head looking down inside of this transformer. I don't know who he was.

Q. Where were you located at that time?

A. I was located right where they take the

(Testimony of LaVerl A. Johnson.)

temperature, they [267] have a little cage where they take the outside temperature.

Q. Where is that with reference to the sub-station?

A. The sub-station right near the plant, up against the plant,—it is between that sub-station and the blacksmith shop.

Q. How far from the sub-station were you?

A. Which sub-station?

Q. The one where you were injured.

A. I guess I was 50 yards, well, maybe,—yes, I guess maybe about 75 feet away.

Q. Did you ever have occasion to call anyone at the railroad because of any power failure?

A. I never did.

Q. Do you recall, Mr. Johnson, on about November 27, 1950, while you were in the hospital that Mr. Shoup and Zola Benda came to see you?

A. I cannot say that I do.

Q. You don't remember them coming?

A. No.

Q. I think I may have forgotten to ask you, Mr. Johnson, or maybe you have told me,—did Howard Johnson give you the key to get into the transformer cage? A. Yes.

Q. At that time, when he gave you the key there was nobody around there for the Union Pacific Railroad Company, was there?

A. There was no one there at all. [268]

Q. There was no one from the Union Pacific Railroad Company that told you to paint either the

(Testimony of LaVerl A. Johnson.)

cables to and from the transformers in the cage there at the ice plant or over at the sub-station where you were injured?      A. No, sir.

Q. While you were working at the Pacific Fruit Express you always took orders from Mr. Shoup or Mr. Johnson or someone else that worked for the Pacific Fruit Express?      A. Yes, sir.

Q. You took no orders from anyone connected with the Railroad Company?

A. Well, not at the plant.

Q. While you were working out there in connection with the plant, all of the orders that were given you were given by someone working for the Pacific Fruit Express Company, isn't that correct?

A. Yes.

Mr. Anderson: I think that is all.

### Redirect Examination

Q. (By Mr. Racine): Just one more question, if I may. When you went into the sub-station was anyone present at all?      A. No, sir.

Q. How did you get in?

A. I unlocked the gate and went in. [269]

Q. You unlocked the gate with the key that had been given to you?      A. Yes.

Q. There was no one there at all, neither Howard Johnson or anyone else?      A. No.

Q. This man that was with Howard Johnson, the one that you say that was inside the sub-station, do you know whether he was with the Pacific Fruit

(Testimony of LaVerl A. Johnson.)

Express or in the employ of the Pacific Fruit Express?      A. No, he wasn't a PFE employee.

Q. Was that the same man that you had seen in this truck?      A. Yes.

Q. Was that the same man that you had seen driving the truck on November 4?      A. Yes.

Mr. Racine: That is all.

#### Recross Examination

Q. (By Mr. Anderson): You don't know who he was?      A. No.

The Court: He has said that a good many times.

Mr. Anderson: That is all.

Mr. Racine: If the Court please, I think [270] we are about ready to rest but if we may have until tomorrow morning we would appreciate that.

The Court: We will adjourn at this time until 10:00 o'clock tomorrow morning.

November 24, 1953, 10:00 o'clock a.m.

Mr. Racine: I wonder if my recollection is right that the hospital records were not stricken.

The Court: They have not been,—I am glad that you called that to my attention. The hospital records were referred to in connection with other matters except his incompetency and I think that the hospital records should remain in evidence. The other exhibits, would you look at them, Mr. Racine, and see if you agree with me as to which ones do not pertain to the hospital records there. I think there is a letter that should be stricken, I think all of the exhibits possibly except the hospital rec-

ords,—I am not sure what were included in your motion but I think the other exhibits should be stricken.

Mr. Casterlin: I understand all that remains are Exhibits 9, 10, 11, 12 and 13, our motion to strike went to all of them.

The Court: Your motion was to strike all of them? [271]

Mr. Casterlin: Our motion was to strike them all and the Court held them in only for the purpose of showing the medication and not for any purpose of incompetency.

The Court: That was only for the purpose of showing the treatment that he received at the hospital.

Mr. Casterlin: That was my understanding and that was only with respect to pain and suffering.

The Court: Now, I am sure that there is one letter that is not in or at least it should be stricken. A letter that she wrote and the answer to it that pertained entirely to the statute of limitation.

Mr. Racine: I understand now that Exhibits 1 to 8 are to be stricken.

The Court: That is right.

Mr. Racine: And 9, 10, 11, 12 and 13 remain.

The Court: Yes, they would remain only as to the treatment he received at the hospital and so on.

Mr. Casterlin: Relating only to pain and suffering.

The Court: That is right.

Mr. Racine: Then, your Honor, at this time the plaintiffs rest.

The Court: The jury may retire for a moment.

(In the absence of the jury.)

The Court: I take it that you probably want to make a motion at this time, and that is the reason that I excused the jury.

Mr. Anderson: I don't believe that we will at this time, your Honor.

The Court: Then, Mr. Bailiff, you may recall the jury.

(The following in the presence of the jury.)

The Court: You may make your opening statement.

(Opening statement made by Mr. Anderson.)

Mr. Anderson: Before we start, Mr. Racine, in accordance with our previous stipulation, it now may be stipulated that the Pacific Fruit Express and the Union Pacific Railroad Company are separate and distince corporations organized under the laws of the State of Utah and are qualified to transact business in Idaho and were qualified to transact business in Idaho prior to and as of November 4, 1950.

Mr. Racine: That is our understanding.

The Court: Then it may be so stipulated,—that will save us a great deal of time.

Mr. Anderson: I would like to call my first [273] witness perhaps a little out of order so that he may get away.

The Court: That will be perfectly agreeable.

EARL R. GILBERT

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Anderson): Your name is Earl R. Gilbert?      A. That is right.

Q. And you have previously testified in this case?      A. Yes, sir.

Q. I take it that you are familiar with the Pacific Fruit Express sub-station which has been discussed here considerably?      A. I am.

Q. Do you know that it was constructed in 1925 or thereabouts?

A. It was constructed before I came to Pocatello in 1929,—yes, it was there at that time.

Q. What have you to say, Mr. Gilbert, with reference to whether or not that sub-station, at the time it was constructed, or when you first saw it, was a standard type of sub-station?

A. That sub-station was standard at the time; it was a package sub-station, I don't know whether it was a Westinghouse or a General Electric sub-station,—it came as a package job and it was installed as is. It was at the time, in the 20's, [274] yes, that was the latest thing in sub-stations at that time.

Q. Knowing this sub-station as you did on November 4, 1950, can you state whether or not the sub-station and the equipment therein were safe for the delivery of electrical energy of 12,500 volts?

A. Will you state that again, please?

(Testimony of Earl R. Gilbert.)

Mr. Anderson: Will you repeat the question, Mr. Vaughan?

(Question read by the reporter.)

A. The delivery of electrical energy was just as safe as at the time it was installed, there had been nothing done to change that,—it was just as safe as the day it was installed.

Q. Can you state whether or not there was anything defective about the appliances in the sub-station or any connections thereto?

A. They were not defective but they had not been operated safely. Am I making myself plain on that?

Q. Yes. There was nothing defective about the equipment, you say?

A. It was operating just as good as at the time it was installed.

Q. Can you state whether or not it was capable of receiving safely energy that was being delivered to it?

A. Yes, sir, that could be delivered safely as long as the gate was locked. am I making myself clear?

Q. What I mean, Mr. Gilbert, is, did the equipment in the sub-station [275] or rather was that equipment in the sub-station and the sub-station itself capable of receiving electrical energy safely and operate as a sub-station should?

A. Yes, as a sub-station it was delivering service the same as it was originally, that is right.

Q. The condition that the sub-station was in, Mr.

(Testimony of Earl R. Gilbert.)

Gilbert, on November 4, 1950, can you state whether or not there was any reason for not delivering electrical energy to it? In other words, I will put it this way, assuming that the Idaho Power Company, your employer, was making delivery of electrical energy directed to that sub-station, would you advise your company not to deliver electrical energy to it?

A. No, we would not advise them not to deliver energy because the service was always delivered to it,—at that time the sub-station had not been changed; it was safe at the time we started service and there was no reason why service should have been cut off.

Mr. Anderson: That is all.

#### Cross Examination

Q. (By Mr. Racine): Now, Mr. Gilbert, you stated that this was a package type of sub-station?

A. Yes, sir.

Q. As a package type sub-station was the installation and the [276] connection of the equipment and the installation of the switches and the tying in of the transmission lines to the switches in accordance with the safety practices?

A. That was standard at the time when it was installed. May I say this, there was a considerable number of sub-stations of that type installed in the 20's, just exactly like this.

Q. Since the 20's that is not the standard?

A. The standard has been changed since then.

(Testimony of Earl R. Gilbert.)

What I mean by that, the standards are just alike with the exception that if this sub-station had been operated properly, the disconnect pulled, it would have been perfectly safe. That is what the disconnects were installed for. No man should have been in that yard unless he was qualified. The wires were low and there was a possible chance of tripping or falling or reaching to them, that is a hazard that we watch if there is anything hot and a man is in the yard.

Q. Under those circumstances, in the Idaho Power Company, if there had been such a sub-station you would have put a barrier or isolated those lightning arresters in some fashion, wouldn't you?

A. We would have either barricaded it or eliminated it, yes, sir.

Q. That wasn't done on November 4, was it?

A. No, sir, it had not been changed.

Q. And the lightning arresters were within a few feet of the [277] ground with bare, uninsulated wires which a person could touch when the disconnects were not pulled?

A. That's right.

Q. And in so doing, such person would have been injured, maimed or killed?

A. You have 12,500 voltage there which is very wicked.

Q. And from your view of the premises that day, that is exactly what happened to LaVerl Johnson, isn't it?

A. May I digress a moment?

Q. Yes.

(Testimony of Earl R. Gilbert.)

A. I have often wondered what LaVerl Johnson's instructions were,—

The Court: I think you should keep to the question, Mr. Witness. It is quite confusing not to answer the question. Of course, then if you want to make an explanation, that is different.

A. Okay.

Mr. Racine: Will you read the question, please?

(Question read by the reporter.)

A. LaVerl Johnson walked into the 12,500 volts.

Q. At a place where the lines were within a few feet of the ground and where they were not barricaded or isolated?      A. That is right.

Q. And where there were no warning signs or instructions in [278] the sub-station as to the energy in such lines?

A. That's right, after he had unlocked the gate, yes.

Q. And that was at a time when the pole-top switch was open?      A. Yes, it was open.

Q. And the disconnect switches were not pulled?

A. That's right, they were not pulled, if they had been pulled it would have been safe, that is what I was trying to get at.

Q. Isn't it a fact that the lightning arresters as they were situated and existed in that sub-station on that day, were outmoded by many years?

A. I can show you three sub-stations exactly like that, I am wondering how much they are outmoded, there are three sub-stations just like that in this area today.

(Testimony of Earl R. Gilbert.)

Q. They are on the Union Pacific Railroad Company property? A. Not exactly.

Q. Are there any sub-stations where the lightning arresters are located just that way?

A. No.

Q. That is where they are without any barricade, without being placed out of reach?

A. There is one.

Q. Where is that?

A. At Batiste Springs.

Q. And that is owned by the Union Pacific?

A. I suppose so.

Q. It is operated by the Union Pacific?

A. It is located out there where no one can get in unless they are going in for a purpose. \* \* \* \* \*

Q. Mr. Gilbert, you were out to the sub-station on November 4, 1950, in the afternoon?

A. I was. \* \* \* \* \* [280]

Q. In your opinion, Mr. Gilbert, when you saw the sub-station that day wasn't it your opinion that the sub-station as it existed that day and the equipment, located as it was, and the switches, located as they were, were out-moded?

A. I made the statement——

The Court: ——Just answer the question, I think you can answer that one yes or no. I ruled any statement you might have made out.

A. I made the statement, yes.

Mr. Casterlin: Do you want to explain now, Mr. Gilbert?

The Court: Just let the witness testify, you will

(Testimony of Earl R. Gilbert.)

have a chance to examine later. The only reason that I stopped his making the statement was that you had objected to it and I sustained the objection.

Mr. Casterlin: I thought maybe he understood from that ruling that he did not have a right to make the explanation.

The Court: No, I don't think he understood that. He just didn't have the right to make the statement after you objected to it and I sustained the objection. I didn't intend to stop you in any other way, Mr. Witness.

Mr. Racine: Now, I don't know whether Mr. Gilbert answered the question or not. Will you read [281] the question, Mr. Reporter?

(Question read by the reporter).

A. Yes, I think I made the statement.

Q. And is that your opinion, Mr. Gilbert?

A. Can I qualify my statement and say what I meant by that?

Q. Yes.

A. The new type of Pellet arresters absolutely get rid of wires coming towards the ground. They are installed on a rack or a pole ahead of it and it does away with anything on the ground.

Q. It does away with any risk,—the Pellet type arrester does away with any risk of a charge of electricity coming down to the lightning arrester located on the ground, located and installed and connected in ahead of the pole type top switch?

A. This is just a little confusing, what do you

(Testimony of Earl R. Gilbert.)

mean by charge, you mean in circuit, or do you mean a lightning discharge that will bleed off?

Q. In circuit?

A. With your Pellet type arresters, you do not have the wires leading down.

Q. They are on top of the pole?

A. That is right.

Q. On this day, with this type of lightning arrester,—what was that type? [282]

A. This type of lightning arrester is called the dry type of arrester. They have plates with a little gap in the top of it and when the voltage hits a certain voltage, it jumps that gap and goes to ground through the arrester.

Q. Mr. Gilbert, by the Pellet type of lightning arrester will you explain to the Court and jury just what you mean and just where it would be located with reference to Exhibit No. 20?

A. I would not tell you where they would be located, they could be located in several places and still get the same result. Your Pellet type arrester taps on the line on top and taps on the ground on the bottom on a 6900 or what we call a 95. They are approximately that long (indicating). They are porcelain with copper oxide pellets and as the current goes through then it breaks it and the current goes through and it bleeds off excessive current.

Q. But the Pellet type lightning arrester is not located on the ground at all?      A. No, sir.

Q. And it is out of reach of all, either qualified

(Testimony of Earl R. Gilbert.)

or unqualified persons, who would be on the ground in the sub-station?

A. It is located up close to the lines.

Q. And now, Mr. Gilbert, in this sub-station isn't it a fact that the lines carrying energy into that sub-station could have been run over another five or six feet in such a manner [283] that it would have eliminated any opportunity of the transformer being de-energized and not having the lightning arresters de-energized?

Mr. Anderson: We object to that as incompetent, irrelevant and immaterial and speculative; trying to determine this after the event and not prior to the event.

The Court: I understood he testified as to the condition at that time, of course, confining the evidence to that time he may answer.

A. Will you re-state that question?

Mr. Racine: Will you please read it, Mr. Reporter? (Question read by reporter.)

A. If you attach that on the load side of the switch,—when the switch would be open then the complete yard would have been dead.

Q. In other words, if these lines, instead of running out here came over here to the——

A. ——No, that is wrong.

Q. Will you explain that to the jury, Mr. Gilbert?

A. This line here (indicating) tapped ahead here, what we call the line side or toward the energized power, had been tapped back of this switch,

(Testimony of Earl R. Gilbert.)

when the switch was pulled, that complete yard would have been dead. [284]

Q. You are referring to the pole-top switch?

A. To this pole-top switch.

Q. Which is operated by the arm?

A. The arm coming down here.

Q. That is different than the disconnects?

A. Yes, when this was open here this is still hot (indicating) but if these were opened here then this would have been dead.

Q. That day out there the pole-top switch was open? A. Yes.

Q. But the lightning arresters were energized?

A. The disconnect had not been pulled. \* \* \* \* \*

Q. In your opinion, would one in the exercise of ordinary care, [285] —an electrician who had knowledge of the condition existing in that sub-station on that day, and of the further fact that unqualified persons were in there from time to time,—would an electrical person or an electrician with such knowledge have taken steps to prevent current from coming into that sub-station?

Mr. Anderson: We object to that, it is certainly calling for a conclusion of the witness and based on something that is not in the record.

The Court: He may answer, he is an expert.

A. I am not an expert.

The Court: The Court is ruling as to that, Mr. Witness, you are not ruling. He is testifying here as an expert, just answer the question if you can.

A. A qualified man should have come into that

(Testimony of Earl R. Gilbert.)

yard to give this man a clearance. That gate definitely states there is high voltage and that warned him, the fence warned him. When you open that gate there should be a qualified man to tell this man what was dead and what was not.

Q. If you had known that an unqualified man or men were going into the sub-station with the conditions that existed there on November 4, 1950, in your opinion, would a qualified electrician with such knowledge attempt to cut the energy or to take steps to see that such unqualified persons were not [286] in the sub-station?

Mr. Anderson: We object to that as repetition, there is no connection here at all and there is nothing to show that the Railroad Company was involved in the matter concerning which questions are asked.

The Court: I think he has answered the question but he can answer it again.

A. At no time would I send a man into that place unless there was a qualified man with him.

Q. And if you had knowledge that such person was in there you would take steps to see that he was protected?     A. Yes.

Mr. Racine: That is all.

#### Redirect Examination

Q. (By Mr. Anderson): If the disconnect switch had been pulled the station would have been safe?

A. It would have disconnected all of the yard.

(Testimony of Earl R. Gilbert.)

The Court: Mr. Witness, I don't want you to take any offense at anything I might have said in my ruling, you were qualified here as a witness and I simply indicated that you were testifying as such.

Mr. Anderson: That is all. I suppose that Mr. Gilbert would like to be excused.

The Court: Unless there is some reason [287] for his staying he may leave when he wants to.

Mr. Anderson: I would like to introduce some contracts that have already been furnished to the plaintiffs.

The Court: You may have them marked and shown to counsel.

Mr. Anderson: We offer in evidence Defendant's Exhibits No. 26, 27, 28 and 29.

Mr. Davis: We don't have any objection but I want to call the Court's attention to one thing. There is a paragraph in Exhibit No. 26 and before it was read, if they intend to read it to the jury, I think that would be dependent on the Court's instructions as to whether or not it would be proper and whether or not other instructions should be given on this matter.

Mr. Anderson: I meant to say with reference to Exhibit No. 26 that we offer the whole contract except Sections No. 13 and 14.

Mr. Davis: We object to that, if the contract goes in, of course it goes in as a whole for what it is worth.

The Court: You may proceed and I will rule on this later.

Mr. Anderson: I have some exceptions with reference to some of the other exhibits. Exhibit No. 27 is [288] offered for all purposes. Exhibit No. 28, all of the contract except the description of the land, commencing on Page 1 and referred to as Exhibit A, excepting also Sections 8, 10 and 11. With reference to Exhibit 29, that is offered for all purposes.

Mr. Davis: Our position is this, we have no objection to these exhibits but they cannot pick out any certain portions of the exhibits and say they are offered for all purposes and other portions not offered at all, and some portions limited, if they go in at all they should go in for all purposes, otherwise we object to them as incompetent, irrelevant and immaterial.

Mr. Casterlin: Counsel's position would be right if this was a suit on a contract. This action is not on a contract and there are certain matters that are admissible as evidence and others that are not admissible and that is the distinction that we make.

The Court: It is rather unusual to introduce a writing and then to read one paragraph in and leave out another paragraph. I will admit the exhibits except for one matter that Mr. Davis asks to have read,—I will admit them and then I will permit counsel for the defendants, or rather for the plaintiffs, if they wish to offer the entire contract.

Mr. Anderson: You mean as to all of the [289] exhibits, your Honor.

The Court: I am going to withdraw that ruling that I just made and I am going to take a little

time because I want to look into this. Of course, you understand you gentlemen can make mistakes and they don't amount to a great deal but mine are quite serious in the record.

Mr. Anderson: I won't undertake to read them at this time.

The Court: No, it would be well to pass those exhibits now and I will rule whether I will permit them to be admitted or not.

Mr. Anderson: As I understand it, there is no objection to Exhibit No. 27 and 29.

The Court: That doesn't make any difference at this time, I am not admitting any of them now until I look them over and then I will rule on all of them, I take it if I sustain the objection Mr. Davis has made to the one exhibit then it will be up to you to decide whether you want to offer all of the exhibit or not.

Mr. Anderson: I take it if your Honor, when he has considered these matters if they are admitted they will be read to the jury or may be read at that time.

The Court: That is right. [290]

### HAROLD R. ARTER

being called as a witness by the defendant, after being first duly sworn, testifies as follows:

#### Direct Examination

Q. (By Mr. Anderson): Will you please state your name?           A. Harold R. Arter.

Q. Where do you reside, Mr. Arter?

(Testimony of Harold R. Arter.)

A. 1921 16th Avenue, San Francisco, California.

Q. By whom are you employed?

A. By the Pacific Fruit Express Company.

Q. How long have you been in the service of the Pacific Fruit Express Company?

A. About 34 and a half years.

Q. In what capacity?

A. Well, for 31 years as chief of the department of disbursements.

Q. What do you mean by department of disbursements, is that in the accounting department?

A. That is correct.

Q. And what job do you hold now?

A. Chief clerk.

Q. Of what?

A. The disbursements accounts bureau.

Q. For the Pacific Fruit Express Company?

A. That is correct.

Q. As such, do you have under your charge and control the records pertaining to the accounts which have to do with, let us say, physical property of the Pacific Fruit Express Company in Pocatello, such as the sub-station?     A. I have.

Q. Mr. Arter, I show you what has been marked for identification as Defendant's Exhibit No. 30, will you state what that is, please?

A. That is the estimated cost to construct a power station and transmission line for taking power under combined load with the Oregon Short Line Railroad Company.

Q. At Pocatello?     A. Yes, sir.

(Testimony of Harold R. Arter.)

Q. Just what is the date of that?

A. January 12, 1925.

Q. Is that a record that is in your custody and control and kept in the usual course of business?

A. Yes.

Mr. Anderson: We offer in evidence Defendant's Exhibit No. 30.

The Court: Is there any objection?

Mr. Davis: We have no objection.

The Court: It may be admitted.

Q. Now, Mr. Arter, I show you what has been marked as Defendant's [292] Exhibit No. 31 for identification, will you state briefly what that is?

A. This is an abstract of the actual cost of the work that I just explained.

Q. The amount that was paid as to the other exhibit, is that what you mean?

A. Work order, pertaining to the work order.

Q. What is the exhibit, does it have any reference to Exhibit No. 30?

A. Yes, it does.

Q. And what is that?

A. This is the actual cost.

Q. This is the actual cost rather than an estimate?

A. That is right, the other is an estimate, a work order, and this is the actual cost for that work.

Q. Does that have a date on it?

A. No, it doesn't.

Q. I notice in the left hand corner, Mr. Arter——

(Testimony of Harold R. Arter.)

A. — Yes, it says "Completion report 164, June 17, 1926".

Q. And does it have an account number ahead of the abstract of items, does that have an account number?     A. Yes, 208.

Mr. Anderson: I will offer Defendant's Exhibit No. 31 in evidence at this time.

Mr. Davis: We have no objection. [293]

The Court: It may be admitted.

Q. Mr. Arter, with reference to Exhibit No. 31, what do the items in the abstract there represent, what does that represent?

A. This represents charges from the Union Pacific for performing this work for us.

Q. And paid by the Pacific Fruit Express Company?     A. Yes.

Q. Does that record indicate or can you tell me if the Pacific Fruit Express Company paid the Oregon Short Line Railroad Company for the full cost of the work shown on Exhibit No. 30. I am speaking now of the sub-station and the installation of the transmission lines.

A. That is right, they are all Oregon Short Line bills.

Q. Mr. Arter, I show you what has been marked for identification as Defendant's Exhibit No. 32, will you tell me what that is, please?

A. This is a completion report of the actual cost of the construction of the power station at Pocatello.

Q. Will you tell me which document is made

(Testimony of Harold R. Arter.)

first,—is Exhibit No. 31 or Exhibit No. 32 made first?

A. Exhibit No. 31.

Q. That is made first?

A. Yes, this is an abstract of the actual cost as they go into the accounts. [294]

Q. Exhibit No. 32 is made after that?

A. Yes, sir.

Mr. Anderson: We offer Exhibit No. 32 in evidence.

A. This also balances with Exhibit No. 31.

Mr. Davis: We have no objection to the exhibit.

The Court: It may be admitted.

Q. Mr. Arter, I show you what has been marked for identification as Defendant's Exhibit No. 33, can you tell me what that is?

A. This is a billing from the Union Pacific Railroad Company against the Pacific Fruit Express Company for electrical work done for our account in October of 1948.

Mr. Anderson: We offer in evidence Exhibit No. 33.

A. I might say that there is an additional bill on this.

Mr. Anderson: We offer Exhibit No. 33 in evidence, if the Court please.

Mr. Davis: May I ask a question on this?

The Court: Yes, you may.

Q. (By Mr. Davis): This Exhibit No. 33, that has nothing to do with the construction of the substation and the power lines but is for services ren-

(Testimony of Harold R. Arter.)

dered in connection with the ice crusher and the ice dock?

A. It is my understanding that it has to do with the sub-station. [295]

Q. That it has to do with the sub-station?

A. That is my understanding.

Mr. Davis: Is that counsel's understanding?

Mr. Anderson: No, frankly it is not.

Mr. Davis: With that understanding, we have no objection.

The Court: If counsel has a different opinion than the witness concerning this exhibit I think it should be clarified, there is no use putting in an exhibit here on which there are different understandings between counsel and the witness.

A. What was your question, sir?

The Court: Maybe you can clarify that, Mr. Anderson.

Q. Exhibit No. 33, Mr. Arter, refers to expenses in connection with electrical installation and services to ice crusher and ice dock,—you don't understand that has any relation to the sub-station?

A. Well, it was electrical work as far as I know.

Mr. Anderson: That is right, and that is the purpose of this, to show that the Railroad Company does do some work, electrical work for the Pacific Fruit Express; that is all this is offered for, that is the purpose of it.

Mr. Davis: With that understanding, we [296] have no objection to it.

The Court: It may be admitted.

(Testimony of Harold R. Arter.)

Q. Mr. Arter, I show you Exhibit No. 34 marked for identification, is that the additional bill that you referred to in connection with Exhibit No. 33?

A. Yes, sir.

Mr. Anderson: We offer Defendant's Exhibit No. 34 in evidence.

Mr. Davis: We have no objection.

The Court: It may be admitted.

Mr. Anderson: I take it that I should read these to the jury.

The Court: I suppose that they could be read easier to the jury than handing them to the jury. I think we will take a recess before going into that, Mr. Anderson, and in regard to Exhibits 26, 27, 28, and 29, I find that Exhibits 27 and 29 are not complete without Exhibits 26 and 28. In other words, if I admit the two and there does not seem to be any objection to No. 27 and 29,—they would not be complete without the other exhibits.

Mr. Anderson: That is correct.

The Court: The question confronting the Court is whether a contract, that is any part of this contract should be admitted which are offered, unless they are all admitted in full. As I say, the first two refer to [297] the other two, that is, the two that are not objected to refer to the other two, and to make them a part of the contract seems to be the purpose. I wish counsel would go into this question a little and if you have any authorities that you would like to give the Court to the effect that I can admit them in part without admitting all of

(Testimony of Harold R. Arter.)

them I will be glad to have the authorities and I will do some work on that myself. I admit that this question that I have has not been before me where a part of an instrument is offered without all of it,——

Mr. Anderson: ——I have no authorities but as your Honor has observed in going through these there are a number of things in the contract that have no relation to the issues in this case, there are bound to be such where you have contracts but there are parts that are relevant and it occurred to me that they should not be offered, that is, the parts that are not relevant.

The Court: Well, I will have to study it, as far as I can see now I see no reason for offering it at all for any purpose, any part of it, however, if it is going to be offered in part, I will have to be very careful as to what part is offered and what part is not. It doesn't seem to me that the contract as offered is intelligible, if the jury was to have this now they would not know what it meant because it refers to a portion that [298] would not be in evidence. I wish counsel for both sides would go into this and advise the court as to any authorities they may have. We will recess at this time for 15 minutes.

November 24, 1953, 11:20 o'clock a.m.

Mr. Davis: I call your Honor's attention to the fact that these exhibits are based upon the arrangement or the understanding or the theory that the

(Testimony of Harold R. Arter.)

exhibits that have not been offered in evidence refer to and this witness is being questioned on the theory that the exhibit is before the jury and that would be the only basis for this, that they are operating under this Exhibit No. 26.

The Court: If these are tied in with that exhibit, this matter is going to get rather complicated right soon.

Mr. Anderson: They certainly are, that is,—

The Court: —You don't need to read those to the jury at this time. Do you want to cross examine this witness?

Mr. Davis: I didn't know whether Mr. Anderson was through.

Mr. Anderson: I have another question.

The Court: Very well, you may proceed. [299] Maybe I better look at those right now, it will only take a few minutes.

Mr. Anderson: Exhibit 30, 31, and 32 do relate to the construction contract which is Exhibit No. 26.

The Court: Read the other exhibit then, they are admitted,—these are admitted but in view of the question raised the ruling admitting No. 30, 31 and 32 will be withdrawn and I will rule on it later.

Mr. Anderson: Now, may I read these to the jury?

The Court: Yes, you may go ahead.

Mr. Anderson: Exhibit 33: "Pacific Fruit Express Company, 116 New Montgomery Street, San

(Testimony of Harold R. Arter.)

Francisco 5, California. Form 520, Form 601, Audit No. 86325. Voucher Blank, Bill 38480433 Month's Account 12-48. J. F. Department No. 8732, Date Made January 3, 1949. To Union Pacific Railroad Company Debtor. Make checks payable to Union Pacific Railroad Company and address all remittances to the Assistant Treasurer, Omaha 2, Nebraska. For expenses incurred, your company for electrical installation services to ice crusher and ice dock at Pocatello, Idaho, during the month of October, 1948. Payroll 53-1 and 2 electrical road Gang No. 2 and No. 3. Installation services, 16 hours at \$1.44 per hour, 23.04; 80 hours at 1.39 per hour, 111.20; [300] 96 hours at \$1.16 per hour, 111.36. Total 245.60. Vacation allowance 3% on \$245.60, \$7.37; RRR and UI tax 6.25% on \$252.97, \$15.81; Supervision 10% on \$245.60, \$24.56; Personal expenses, electrical road gang: Voucher E 758544 William R. Bevans, \$27.00; Voucher E 758546 George A. Bailey, \$15.05; Voucher E 756478 Ray Roberts, \$4.10; Voucher E 756486 Wilford G. Averett, \$23.85; Voucher E 754984 Auburn C. Taylor, \$15.10; Voucher E 754988 Clyde W. Casper, \$16.90. Total \$102.00. Form 502-1 Material used December 1948 accounts; 710 pounds No. 6 Triple Braid W. P. Wire at 36 cents a pound, \$255.60. Freight charges, Omaha, Nebraska, to Pocatello, Idaho, 710 pounds at \$1.45 per hundred, \$10.30; Material store expense 6.50 per cent on \$265.90, \$17.28; Superintendence 5 per cent on \$283.18, \$14.16; Federal transportation tax 3 per cent on \$10.30, \$.31. Total

(Testimony of Harold R. Arter.)

\$692.99". Then there is a stamp, in fact several stamps I will read: "Paid journal voucher month of January, 1949". Another: "Add bill notation made on all records affected A21974; 11-49". And that has a signature, "I. S. Briggs." Another stamp "Paid reciprocal agreement debited account, bills payable voucher prior to approval month cleared, January, 1949. Included in settlement for month of January, 1949. For further information address Officer of General and Station Accounts, UPRR Company, Omaha 2, Nebraska."

Mr. Davis: If the Court please, we have [301] no objection to their reading these exhibits but you will notice that they tie into these other agreements and I think it is rather confusing.

Mr. Anderson: I don't see where they tie in at all.

The Court: I sort of agree that they all come under the same heading. It seems to me that the time taken here, this could be fully covered by stipulation between the parties. Of course, counsel have their own theory but I cannot see where any of these exhibits which I have read are material to the issues as they are being presented,—then I am wondering, in view of the fact that these exhibits are admitted, and the jury will have them for their consideration, that is, if they are admitted, if it would save a great deal of time if you would just state what they are and not read them entirely to the jury, I will let you finish reading that one, the Exhibit 34, I believe it is. I believe that I will just

(Testimony of Harold R. Arter.)

let you finish reading those exhibits, Mr. Anderson.

Mr. Anderson: Very well, this is Exhibit No. 34: "Pacific Fruit Express Company, 116 New Montgomery Street, San Francisco 5, California. Bill No. 1775." Then there is a stamped number, "423688 Month's Account October, 1949. J. F. Department No. 6506, Audit No. 21974. Date made, November 7, 1949. To Union Pacific Railroad Company [302] Debtor. Make checks payable to Union Pacific Railroad Company and address all remittances to the Assistant Treasurer, Omaha 2, Nebraska. For expenses incurred in connection with electrical installation service to ice crusher and ice dock at Pocatello, Idaho, in addition to those included in bill collectible J. F. 8732 Audit No. 384804 of January 3, 1949." That is Exhibit No. 33. "Labor: P. R. 53-2 electrical road gang 4-25, 8 hours. 4-26, 8 hours, 4-27, 8 hours, total 24 hours at \$1.51, total 36.24. Supervision,—10 per cent on \$36.24, \$3.62; Vacation allowance,—3 per cent on \$36.24, \$1.09; RRR and UI taxes,—6 per cent on \$37.33, \$2.24; Material,—Form 502-1 No. 404, April, 1949, 1 each CMS-325, Meter base at \$2.55 each, \$2.55; Form 502-1 No. 544 May, 1949, 1 each 3 phase, 25 ampere, 440 volt meter at \$33.10 each, \$33.10, total \$35.65; Freight charges, Omaha, Nebraska, to Pocatello, Idaho, 15 pounds at \$5.12 per hundred, 77 cents; Material store expense,—7½ per cent on \$36.42, total \$2.73; Superintendence,—5 per cent on \$39.15, \$1.96; Federal transportation tax,—3 per cent on 77 cents, two cents, total \$84.32. Paid journal

(Testimony of Harold R. Arter.)

voucher month of November, 1949. Checked by V. M. November 15, 1949. Paid, reciprocal agreement, debited account, bills payable. Vouchered prior to approval, month cleared December, 1949. A and B 1776. Notation made on all records affected. A86325. A91701, [303] I. S. Briggs. Included in settlement for month of November, 1949. For further information address Auditor of General and Station Accounts, UPRR Company, Omaha 2, Nebraska."

The Court: I am going to admit Exhibits 30, 31, and 32. I cannot see any reason for it but I am going to admit them. I am wondering if it is necessary to read every bit of the exhibits to the jury,—I merely ask this in the interest of time.

Mr. Anderson: If it is agreeable with counsel that we may read them at any time and in whole or in part——

The Court: ——I don't imagine that is agreeable with them because they have already objected to the admission of the exhibits.

Mr. Davis: We did not object to the exhibits but I did call attention to the fact that they referred and were more or less connected with the other exhibits. He can read them all or in part as he sees fit, it is a combined proposition between the two to save money.

The Court: The only thing that bothers the Court is if we should get a part of these and not all if it would be confusing. But according to this stipulation or agreement now you can read them all or a part at any time, now or during the argument or

(Testimony of Harold R. Arter.)

later during the trial. They are admitted, however.

Mr. Anderson: I will refrain from reading [304] them now and I will read them later. I think, with the Court's permission I will read a part of them now.

The Court: You go right ahead.

Mr. Anderson: This is Exhibit No. 30: "Form 30. Owner, Pacific Fruit Express Company; operated by Pacific Fruit Express Company. A and B 310, E1775. General Manager's No. A and B 310. Office of Assistant General Manager, San Francisco, January 12, 1952,——"

The Court: I was just thinking of the objection, you say 1952, that is after the date of the accident,——

Mr. Anderson: Did I say '52, I meant to say 1925. "January 12, 1925. Authority for expenditure of \$7608.00 is requested for the purpose of blank to the property as follows: Sub-station location, Pocatello, Idaho. Mile post No., blank, description of project: Construction of power, sub-station and transmission line necessary for taking power under combined load with the Oregon Short Line Railroad Company. Recommendations: The Idaho Power Company were recently granted an increase in power rates, which would result in an increase of about \$2670.00 per year in power cost at Pocatello. It is proposed to combine the power load of PFE with that of the railroad, in which event the PFE would be able to purchase its electric energy at about \$.009 per kilowatt-hour which

(Testimony of Harold R. Arter.)

[305] would result in an estimated saving to us of over \$6,000.00 per year or about 80 per cent of the additional investment. This saving will be further increased on completion of the contemplated car shop facilities with corresponding increase in power consumption. Detail estimate attached is based on estimated figures submitted by the Railroad Company as the work is to be performed by them as they have full equipment for handling this type of work. No provision was made in 1925 budget for this work as the matter was subject of considerable correspondence and was overlooked. This document ratified by Board of Directors. Date 2-21-25 AFE four." Following that is a list of estimated expenses, such as engineering, supervision, electrical lines, sub-station, construction, material and other expenditures. Exhibit No. 31 is an abstract of bills, it says: "Construction of power sub-station and transmission line necessary for taking power under combined load with short line RR Company. A-B-310-Pocatello. Account No. 201 engineering". In red "\$65.00 and in the next column \$65.00. Account No. 215 MSE unapplied construction M & S" in red "\$174.00. Unloading and handling account No. 216-4" in red "\$174.00 and \$96.00. Account No. 208 electric lines" in red figures "\$7,273.00; \$835.00; \$5,943.00; \$94.50; \$400.50." The first three of those figures I read were under the heading sub-station and the last two under the [306] heading power lines. Then follows: "Audit No. 38988 OSL Railroad Company contract \$4298.64,

(Testimony of Harold R. Arter.)

under sub-station \$4004.60, under power line \$294.04. Audit No. 36036 OSL Railroad Company contract \$289.50, under sub-station \$289.50. Audit No. 32024 OSL Railroad Company contract \$43.88, under sub-station \$43.88. Audit No. 41745 OSL Railroad Company contract \$1981.67, under sub-station \$1844.03, under power line \$137.64; Audit No. 44815 OSL Railroad Company contract \$168.37, under sub-station \$168.37, and then in red ink B-C OSL refund on Audit No. 38988 \$350.15; under sub-station \$350.15. Totals February 1, 1926, \$6,431.91, under power lines \$431.68, Audit No. 50617 OSL Railroad Company contract \$55.23, under sub-station \$55.23. Total March 25-26, \$6,487.14, under sub-station \$6,055.46, under power line \$431.68. July, 1926, in red B-C 7-20-26 OSL refund \$14.15, under sub-station \$14.15. Audit No. 63701 OSL Company \$3.13, under sub-station \$3.13." Exhibit No. 32 is entitled Form No. 8837 BV Exhibit C. I will read this in part and it says: "GMO A and B 310-Pocatello. Name of Carrier Pacific Fruit Express Company. Owner Pacific Fruit Express Company. Completion report No. 164. Operating Company Pacific Fruit Express Company. Work performed by Oregon Short Line Railroad Company. Roadway Completion [307] Report. AFE No. 4 date February 21-1925, Sheet No. 1 of one sheet. General account one, road, and general account three, general expenditures. Location of project, State, Idaho. Station, Pocatello. Work begun March, 1925. Project completed Sep-

(Testimony of Harold R. Arter.)

tember 30, 1925; turned over to operation September 30, 1925. Description of project: Construction of power, sub-station and transmission line necessary for taking power under combined load with the Oregon Short Line Railroad Company. Cost borne by Pacific Fruit Express Company 100 per cent. Investment in physical property ice manufacturing plants, Pocatello. Account No. 208 power lines cost \$6044.44 power sub-station; \$431.68 power lines; total \$6476.12."

Q. Mr. Arter, just by way of clarification on Exhibit No. 33 and 34 which I have read, what does the term RRR and UI tax 6.25 per cent, what does that relate to?

A. That is Railroad Retirement and Railroad Unemployment Insurance tax.

Q. Who pays that tax?

A. The carrier who incurs the labor.

Q. Meaning the Pacific Fruit Express?

A. The Union Pacific in this case, performing the labor and incurring the tax and rebilling the Pacific Fruit Express and then allowing it back to the Federal government.

Q. In other words, the charge is made on the basis of the [308] payroll and then they charge you the same as the payroll charges?

A. That is correct.

Q. On Exhibit No. 30, can you tell me what A and B-310 indicate?

A. That is our A and B number so that we can identify it through the documents.

(Testimony of Harold R. Arter.)

Q. As it related to the sub-station?

A. That is it, to identify it with any particular work, we have numerous work orders and work order authorities and we have to number them.

Q. Mr. Arter, can you tell me whether or not the Pacific Fruit Express sub-station and transmission line is carried in the Pacific Fruit Express Capital or investment account?

A. That is correct.

Q. And by capital investment account, what does that mean?

A. Anything that you have invested in fixed improvements.

Q. You mean ownership?

A. Yes, and in fact I may say that the roadway completion report 8837 shows that. That is evidence that it went through the investment account.

Q. And that is Exhibit No. 32?

A. If my memory is right, yes, sir.

Mr. Anderson: That's all. [309]

#### Cross Examination

Q. (By Mr. Davis): Now, Mr. Arter, can you tell me by any chance if the ground, the land upon which this sub-station was erected is carried in the capital account of the Pacific Fruit Express Company?

A. The land, you say?

Q. Yes.

A. I cannot tell without looking at the record.

Q. Well, you have looked up the record to testify here, you looked it up to see, did you not?

(Testimony of Harold R. Arter.)

A. I have testified only about fixed improvements.

Q. Well, do you or don't you know that that land is not carried in the capital account of the Pacific Fruit Express?

A. I can say that I wouldn't know.

Q. And don't you know that it is carried in the capital account of either the Oregon Short Line Railroad or the Union Pacific Railroad Company?

A. It would have to be carried in either one or the other but as far as the PFE is concerned I cannot say until I look at the record.

Q. You came, did you not, to testify as to what, with reference to this property in Pocatello and with reference to this sub-station, as to what property was carried in the capital account and assets of the Pacific Fruit Express, did you [310] not?

A. I have only testified——

The Court: Now, just answer the question, you can answer that.

A. May I have the question again?

(Question read by reporter.)

A. My testimony was as far as fixed improvements were concerned.

Q. Do you know about the real estate?

A. Not unless I looked at the record, we have numerous leases.

Q. Well, do you have the record here?

A. Do you have the record, Mr. Anderson?

The Court: Now, Mr. Witness, you are on the

(Testimony of Harold R. Arter.)

witness stand. However, maybe Mr. Anderson can answer it.

Mr. Anderson: I will say this, that it is on leased property and it would be in the capital account of either one of the Railroad Companies and not of the Pacific Fruit Express Company, that is the land.

Mr. Davis: And that it always has been.

Mr. Anderson: I think that is right.

Q. Mr. Arter, what is your position with the Pacific Fruit Express?

A. Chief Clerk of the Disbursement Department.

Q. How long have you been with the Pacific Fruit Express?

A. I joined the Pacific Fruit Express Company on May 6, 1919. [311]

Q. And these exhibits that you have identified, you are familiar with those, and they are in your custody?     A. That is correct.

Q. Mr. Arter, I refer now to Exhibit No. 30 which has to do with the construction of the power sub-station and transmission line,—you have it in mind what I am talking about?

A. Yes, sir.

Q. If you don't you can ask for the exhibit?

A. Yes, sir.

Q. Now, Mr. Arter, the fact is that as a book-keeping proposition and to save the Pacific Fruit Express Company \$6,000.00 a year the Pacific Fruit Express Company and the Railroad entered into

(Testimony of Harold R. Arter.)

an arrangement to get a combined power rate and operate that line as a combined proposition, didn't they?

A. That is an operating question and I have no jurisdiction over it whatever, I am testifying only as to the accounting records.

Q. Do you want to look at this exhibit again?

A. I know what it is, it is the estimated cost of that project.

Q. And you as Chief Accountant and having been with the company since 1919, can you answer the question that I asked you a moment ago?

Mr. Anderson: I think the exhibit is the [312] best evidence.

The Court: He may answer.

A. You mean about the saving in labor?

Mr. Davis: Is it very difficult to read that question again, Mr. Reporter?

(Question read by reporter.)

Q. Now then, in reefrence to the question just read to you, regardless of jurisdiction, I want to know if it is not a fact that they combined in the operation of that line for the purpose of saving the Pacific Fruit Express Company some \$6,000.00 a year?      A. I cannot answer that.

Q. You can't answer that?      A. No, sir.

The Court: Mr. Davis, may I interrupt a minute?

Mr. Davis: Yes, indeed.

The Court: Am I interfering with anybody's plans if we meet at 1:15 today. I am making a desperate effort to see that some people get a Thanks-

(Testimony of Harold R. Arter.)

giving dinner and if they don't I don't think that it will be my fault. It may be that we will have to hold court on Friday, of course, we will not hold any court on Thanksgiving Day. We will recess at this time, if it is not inconvenient to anybody, until 1:15 this afternoon. [313]

November 24, 1953, 1:15 o'clock p.m.

Q. Mr. Arter, your Exhibit No. 30 that we have discussed, that refers to the construction, by the Oregon Short Line Railroad Company, of a sub-station and certain electrical matters?

A. I don't remember that exhibit,—is that the item of \$692.00?

The Court: Show him the exhibit, Mr. Bailiff.

Q. Mr. Arter, you know from your records and from the exhibits that in 1925 the Oregon Short Line Railroad Company constructed the power and sub-station and the transmission lines for the Pacific Fruit Express Company here at Pocatello?

A. That is correct.

Q. Now, you know also, from your records, that since that time the Union Pacific Railroad Company has taken the place of the Oregon Short Line and it has been carrying on the business with the Union Pacific Railroad Company?

A. Yes, sir.

Q. And you know from your records and files that subsequent to 1925 that the Union Pacific Railroad Company leased property and real estate

(Testimony of Harold R. Arter.)

and the railroad of the Oregon Short Line Railroad Company? A. That is right. [314]

Q. And has been operating it since that time?

A. That is right.

Q. Now, about carrying of an item for the capital investment account or capital investment purposes, that is a matter of bookkeeping, isn't it?

A. That is right.

Q. Mr. Arter, do you know whether or not the Pacific Fruit Express Company, the people that you work for, initial or stamp their property out in the field with the letters PFE or some other way so it can be shown that it is their property?

A. That is right, it is in our investment record.

Q. Where you own property of that kind it is stamped so it can be shown?

A. Yes, it is stamped to the Pacific Fruit Express account.

Q. Have you ever been to the sub-station out here? A. No.

Q. Do you know, Mr. Arter, that the sub-station, the picture of which has been shown here, and the frame-work on that not only on November 4, 1950, but all of the time from 1925 when it was constructed bore the stamp of the Oregon Short Line Railroad? A. No, sir.

Q. Do you know that it doesn't bear the stamp of the PFE at all? [315]

A. I don't know what you mean by that?

Q. You don't know what I mean by that at all?

A. No, there may be some material that is

stamped for transportation purposes or for identification.

Mr. Davis: That's all.

Mr. Anderson: I think that is all.

### HENRY C. MEYER

called as a witness by the defendant, after being first duly sworn, testifies as follows:

#### Direct Examination

Q. (By Mr. Anderson): Will you state your name, please?     A. Henry C. Meyer.

Q. And your residence?

A. Omaha, Nebraska, 1310 South 46th Street.

Q. By whom are you employed?

A. The Union Pacific Railroad Company.

Q. How long have you been employed by the Union Pacific Railroad Company?

A. Approximately 40 years.

Q. In what capacity?

A. At the present time valuation engineer.

Q. How long have you engaged in that work or in that capacity?     A. About six years. [316]

Q. Prior to that what did you do?

A. Accountant for the Union Pacific Railroad Company.

Q. What are your duties now,—what did you say your title was or is?

A. Assistant valuation engineer.

Q. As assistant valuation engineer what are your duties?

A. We maintain a record of all of the changes of

(Testimony of Henry C. Meyer.)

the property of the Union Pacific Railroad Company including all its leased lines which are the Oregon Short Line Railroad Company; the Oregon and Washington Railroad and Navigation Company; the Los Angeles and Salt Lake Railroad; the St. Joseph and Grand Island Railroad Company.

Q. Just what do you do with reference to your work, concerning these companies or their accounts?

A. We record all of the property changes, additions and retirements of all of the property of these various lines.

Q. Do you have under your control and under your jurisdiction the records relating to the capital or investment accounts?           A. We do.

Q. What does the capital or investment account mean?

A. It means the property owned by the various lines as I stated before.

Q. Have you, Mr. Meyer, checked your records to determine whether or not the Pacific Fruit Express Company sub-station and the transmission lines connected with it and involved [317] in this case are listed in the capital account records of either the Oregon Short Line Railroad or the Union Pacific Railroad Company?

A. They are not.

Q. Do you know why they are not listed?

A. Well, in investigating this construction of the power sub-station there, I went back to the records and found that back in 1925, what we call our authority for expenditure; I have forgotten the

(Testimony of Henry C. Meyer.)

number but it was in 1925, where we, the Union Pacific or the Oregon Short Line Railroad Company constructed this power station and the lines both from the ice plant to the Batiste Line and it was charged to the Pacific Fruit Express Company. The Oregon Short Line or the Union Pacific constructed it for the Pacific Fruit Express Company which is the owner of the property. We were merely the contractors for the constructing of the station.

Mr. Anderson: I think that is all.

#### Cross Examination

Q. (By Mr. Davis): Mr. Meyer, the Union Pacific Railroad Company does carry as a part of its capital investment certain sub-stations and electrical equipment, for instance, at the Batiste plant?

A. I presume so, I made no investigation of that.

Q. You don't know about that?

A. No, I don't.

Q. You are with the Union Pacific Railroad Company?     A. Yes, sir.

Q. You know that the land on which the sub-station in question is constructed is carried in the capital account or assets of the Union Pacific Railroad?

A. Yes, in the property account of the Oregon Short Line Railroad.

Q. Well, the Oregon Short Line and all of these other companies which you mentioned,—the Union

(Testimony of Henry C. Meyer.)

Pacific Railroad Company is the operating company for these roads?

A. Yes, the Union Pacific Railroad Company leases those lines.

Q. And leased this land? A. Yes, sir.

Q. Have you been out to this sub-station in question here? A. No, I have not.

Q. Do you know that in November of 1950 and prior to that, ever since the same was constructed that the sub-station, the standards and the frame work bore the stamp of the Oregon Short Line Railroad Company? A. I don't know. [319]

\* \* \* \* \*

### HUBERT BRANAM

called as a witness by the defendant, after being first duly sworn, testifies as follows:

#### Direct Examination

Q. (By Mr. Anderson): Will you please state your name? A. Hubert Branam.

Q. Where do you reside?

A. 426 West Benton, Pocatello.

Q. By whom are you employed?

A. Pacific Fruit Express Company.

Q. How long have you been employed by the Pacific Fruit Express Company? [320]

A. About 32 years.

Q. In what capacity?

A. Well, various capacities,—plant manager and at the present time superintendent of refrigeration.

(Testimony of Hubert Branam.)

Q. You have been plant manager of this plant at Pocatello?     A. Yes, sir, I was.

Q. During that time which you mentioned, have you always worked with the Pacific Fruit Express Company?     A. I have.

Q. You never worked for the Union Pacific Railroad Company?     A. Never.

Q. What job did you hold, let us say in 1925?

A. I was made plant manager at that time.

Q. Were you here when the sub-station in question was constructed?

A. It was under construction when I took charge of the plant.

Q. When it was completed can you state whether or not it was turned over to the Pacific Fruit Express Company?

Mr. Davis: I wonder if I may ask this witness a question, your Honor?

The Court: Yes, you may.

Q. (By Mr. Davis): Now, with reference to the turning over of the plant or the construction to the Pacific Fruit Express, was that covered by a written contract and agreement between [321] the Pacific Fruit Express Company and the Oregon Short Line Railroad?

A. I wouldn't know whether there was a written agreement to turn it over.

Q. (By Mr. Davis): Would you know whether it was turned over or constructed under a written agreement?

(Testimony of Hubert Branam.)

A. It was constructed under a written agreement.

Q. (By Mr. Davis): Did the written agreement provide for delivery of the station when it was constructed?

A. I don't know whether it provided for delivery or not.

Mr. Davis: Now, counsel knows whether there was an agreement in writing and if there was a written agreement that would be the best evidence and we object on the ground that this is not the best evidence.

The Court: The objection is sustained until it is shown that there wasn't any written instrument covering this.

Mr. Casterlin: That is one of the exhibits that the Court has not ruled upon, and it was offered for the purpose of showing ownership.

The Court: Then the objection will be sustained as it is covered by a written agreement.

Q. Did you, after construction, accept the property for the Pacific Fruit Express Company?

A. I did. [322]

Q. How long were you plant manager out there, can you tell me?

A. From August 20, 1925, until December,—the end of December, 1943.

Q. Since that time you have been in your present position?      A. That is right.

Q. Do you, in your present position, since you

(Testimony of Hubert Branam.)

left the position of plant manager, do you have any supervision over the ice plant out here?

A. I do.

Q. You may state whether or not you are familiar with the sub-station and the other surroundings adjacent thereto?     A. Yes, I am.

Q. Mr. Branam, I show you what has been marked for identification as Defendant's Exhibit No. 35, can you tell me what it is?

A. It is the location of the various buildings about the ice plant, including the sub-station.

Q. And would you say that it is substantially correct?

A. Yes, it is substantially correct.

Mr. Anderson: Now, we offer in evidence Defendant's Exhibit No. 35, it is merely illustrative.

Mr. Davis: We object to this exhibit for the reason that it shows that it was prepared on 11-15-50 at a date when the Court ruled, on their objection, that evidence would not be received in this case, [323] isn't that correct, Mr. Anderson?

Mr. Anderson: That is correct, but I will ask this question.

Q. I will ask you if you know as of November 4, 1950, if what is shown on Exhibit No. 35 is correct?

A. That is right, it has been that way ever since I took charge of the plant.

Mr. Davis: But there isn't any question but what this exhibit was prepared after the accident and prepared as shown on 11-15-50.

Mr. Anderson: That is correct.

(Testimony of Hubert Branam.)

Mr. Davis: We have no objection with that understanding.

The Court: It may be admitted.

Q. I show you what has been marked for identification as Defendant's Exhibit No. 36, can you tell me what that is?

A. That is a diagram of the sub-station, showing the transformers, the lightning arresters and the power line serving the sub-station.

Q. That is not a complete diagram of the sub-station, is it?           A. No.

Q. It illustrates what?

A. The location of the various parts.

Q. The transformers and the rest of the equipment out there? [324]           A. That is right.

Q. Can you say that is correct as of November 4, 1950?

A. Substantially correct, there are no dimensions shown but it is the proper location of the various parts.

Mr. Anderson: We offer Defendant's Exhibit No. 36 in evidence, only for the purpose of illustration.

Mr. Davis: Was this prepared at the time the previous exhibit was prepared?

A. I don't know, I did not prepare them.

Mr. Davis: Who did prepare them?

A. I don't know.

Mr. Davis: Were they prepared by anyone with the Pacific Fruit Express Company?

A. I don't know who prepared them.

(Testimony of Hubert Branam.)

Mr. Davis: You do know that they were prepared by someone with the Union Pacific Railroad Company?

A. No, I don't know. If there is a signature on there I could probably tell who prepared them.

(The following by Mr. Anderson.)

Q. You could tell from the signature?

A. If there is a signature there, I could, yes, sir.

Q. You could tell whether it was prepared by the Pacific Fruit Express Company or by the Union Pacific Railroad Company?

A. Yes, I could.

The Court: Show the exhibit to the witness. [325]

A. It must have been drawn by the Pacific Fruit Express Company, it has their name, the same as our standard drawings.

Mr. Davis: Was it prepared for use as an exhibit?

A. I cannot tell, I don't know.

Mr. Davis: We have no objection to its admission.

The Court: It may be admitted.

Q. All that you have testified about these two exhibits is that the things shown thereon are substantially correct, for the purpose of illustration?

A. That is correct.

Q. On Exhibit No. 35, which was the first one that you identified,—over on the right-hand side it is listed sub-station A; there is a line running northwesterly over to what is termed sub-station B, what does that line represent?

(Testimony of Hubert Branam.)

Mr. Davis: Now, we object to this as incompetent, irrelevant and immaterial, the exhibit is the best evidence. This man didn't prepare it, he just introduced this exhibit for an illustration of the general plan.

Mr. Anderson: If he knows, he can tell.

The Court: That would be rather unusual to have a man testify to an instrument that was not prepared by him.

Mr. Anderson: Well, if he knows, that's all [326] I am asking him.

The Court: I don't think it is very serious, I will let him answer.

A. May I see the print again?

The Court: Hand the exhibit to the witness.

A. This is the line that furnishes power for the ice plant proper.

Q. From the sub-station?

A. This is the 2300 volt side.

Q. There is another line running to the top of the map from the sub-station, can you tell me what line that is?

A. That is the 12,500 volt line leading to the sub-station.

Q. From where?

A. From the Union Pacific Line which is known as the Batiste Springs line.

Q. What is the fact about whether that line extends over the railroad from the sub-station to the Batiste line?

(Testimony of Hubert Branam.)

A. It extends over the ice platform and the tracks.

Q. Where is the connection with the Batiste or the Union Pacific power line that feeds the sub-station?

Mr. Davis: Is he testifying from the exhibit now?

Mr. Anderson: No, if he knows it.

Q. Let me put it this way, where does the railroad company deliver power which goes into the sub-station? [327]

A. They deliver from that Batiste line that runs north and south.

Q. Across the tracks?

A. There are either two or three tracks between the icing platform and this power line, parallel to the platform.

Q. Does that line that we have just mentioned serve any railroad facilities at all?

A. Which one, the one leading to our sub-station?

Q. From the Batiste line, yes.

A. No, sir.

Q. That merely feeds the sub-station?

A. That is right.

Mr. Anderson: May we hand these exhibits to the jury?

The Court: You may hand them to the jury.

Q. Mr. Branam, state what the fact is as to whether or not there is a switch over on the pole on this railroad to Batiste line, where the line to

(Testimony of Hubert Branam.)

the Pacific Fruit Express Company sub-station takes off?

A. There are disconnect switches, yes, sir.

Q. Have you had some experience as an electrician?      A. Some, yes.

Q. What experience have you had?

A. Well, I started out in a power plant, operating electrical equipment and I served an apprenticeship with the Allis-Chalmers [328] Company handling electrical equipment and operated various PFE Company electrical plants.

Q. While you were plant manager here in Pocatello did you perform some of the electrical work or most of the electrical work that might have been needed around the Pacific Fruit Express Company plant?      A. Yes, sir.

Q. Would you say that you performed part of it or all of it?      A. Part of it.

Q. Now, the sub-station in question here, what is the fact as to whether or not, since the construction and up to November 4, 1950, has it been operating satisfactorily as a sub-station?

A. It has.

Q. Until the injury of LaVerl Johnson, November 4, 1950, had you had any difficulty whatever at that plant with injuries or anything of that sort?      A. No injuries.

Q. I don't know whether you know this or not, —I will ask you if there is any sign on this sub-station that indicates whether it is a General Electric or a Western Electric?

(Testimony of Hubert Branam.)

A. There is a sign on each side that says "General Electric outdoor substation" or words to that effect.

Q. Do you know what that means?

A. I would say that is the manufacturer of the product.

Q. When this plant was constructed,—first, let me ask you [329] this,—there is a meter at the sub-station, inside of the cage?

A. That is correct.

Q. Can you tell me who hooked up that meter after the sub-station was constructed?

A. A representative of the Idaho Power Company.

Q. What are the dimensions of the sub-station, that is about,—approximately?

A. Approximately 30 by 30 feet.

Q. Is there any fence around it?

A. There is.

Q. Is there a gate?                    A. There is.

Q. Is there a lock for that gate?

A. Yes, sir.

Q. Do you know who has the key to that lock on the gate?

A. The plant manager of the Pacific Fruit Express Company.

Q. And who would that be now?

A. Mr. Shoup.

Q. When you were plant manager did you have the keys?                    A. I did.

(Testimony of Hubert Branam.)

Q. How many were there then or how many are there now?

A. There were two then,—I cannot say how many now. When I operated the plant there were two keys.

The Court: Counsel know what they are [330] doing, because counsel are very able on both sides but let me ask, don't you think that we have spent enough time on the size of this station and the fact the gate was locked and so on. All of this testimony up to this time has been to the effect that it is fenced, that there is a key, that the gate was locked, that the key was kept by a man at the Pacific Fruit Express Company plant. I think it is about time to stop this repetition.

Mr. Anderson: I think the Court is right.

The Court: I want you to understand though that I am not trying to stop you on any particular line of testimony, I am simply trying to save some time.

Mr. Anderson: I think the Court is right but it seemed the normal situation to just bring this up-to-date through this witness.

The Court: Don't let me stop you, Mr. Anderson, I have been thinking that I would like to get through this case this week and sometimes I get in a hurry and may be a little bit impatient.

Mr. Anderson: I think the Court is absolutely right on this matter.

The Court: You may go ahead with your examination.

(Testimony of Hubert Branam.)

Q. In this sub-station, Mr. Branam, are there and were there disconnect switches to the lightning arresters? [331]     A. There were.

Q. And could they be pulled by someone there at the Pacific Fruit Express plant when it was necessary?     A. Yes, sir.

Q. Was there a hot-stick available to do that?

A. Yes, sir.

Q. Do you know where the hot-stick was kept?

A. In the engine room.

Q. How far away from the sub-station was that?

A. Perhaps 150 feet, I don't know exactly.

Q. Do you know why it was kept there rather than at the sub-station?

A. To keep it dry, otherwise it would have no protection.

Q. Do you know whether or not on that switch over on the Batiste line, where the line,—the Pacific Fruit Express Company line comes to the sub-station, is there more than one switch over there?

A. Yes, a switch on each phase, that would make three switches.

Q. On three wires?

A. Yes, three wires and three disconnect switches, one on each wire.

Q. And if all of them were pulled, what effect would that have on the power in the sub-station?

A. There would be no power in the sub-station.

Q. In the transformers or the lightning arresters either? [332]     A. No, sir, none.

(Testimony of Hubert Branam.)

Q. Do you know who has control or owns those three switches on the pole?

\* \* \* \* \*

The Court: Who do they belong to?

A. The Union Pacific. [333]

\* \* \* \* \*

### Cross Examination

Q. (By Mr. Davis): You are sure that last answer is correct? A. Yes, sir.

Q. Those switches belong to the Union Pacific?

A. That is right.

Q. Do you understand that you are qualified here as an expert? A. I didn't say so.

Q. I didn't mean it that way, do you consider yourself as an expert electrician?

A. No, not an expert.

Q. Now, the sub-station was in such condition that if the hot-stick was kept there it would not have remained dry?

A. Out in the sub-station it would not, rain would get on it and snow would get on it and it would have become unsafe to use.

Q. Couldn't you have fixed it so that it could have been there and kept dry?

A. If you want to build a house around it, yes.

Q. About how large is that,—oh, I guess everybody knows that,—did you say that you would have to build a house around it?

A. Well, something would have to be built to protect it.

(Testimony of Hubert Branam.)

Q. Would not a metal container do that, one just a little larger than the stick? [334]

A. Perhaps.

Q. Are you an officer of the Pacific Fruit Express Company now?

A. I don't know what you mean by an officer, I am not an executive officer but I am operating it.

Q. You do have an official capacity?

A. Yes.

Q. You are superintendent?

A. That is right.

Q. And you know that the Pacific Fruit Express Company have an important financial interest in this suit?

\* \* \* \* \*

A. I was under the impression that the Union Pacific was being sued.

Q. Do you know or don't you know whether the Pacific Fruit Express Company has an important financial interest in this case?

A. No, I don't know that.

Q. You don't understand, that is, you don't say that they do or you don't say that they don't? [335]

A. That is right.

Q. Now, you know, do you not, that the Oregon Short Line Railroad Company under the original construction agreement that you say you accepted this sub-station and plant from them, you know that they agreed in there, with your company to inspect that meter, do you know that or do you not?

Mr. Casterlin: That is objected to on the ground

(Testimony of Hubert Branam.)

that it is now indicated that this is covered by a written contract and that is the best evidence, and it is not in evidence as yet.

The Court: Is that covered by this contract?

Mr. Casterlin: Yes, it is.

The Court: During the noon hour you gentlemen were to furnish me with some authority, I haven't had much help on that but I have decided myself that a book or document offered in evidence must be considered in its entirety; parts operating against the party offering it as well as parts in its favor. Accordingly, when part of the document is offered by one party then the other party is entitled to put in the remainder. I realize that in this contract there possibly are parts which are not material, but it would be very confusing to the jury, and it would be wondering what those parts were, and I feel that the rule is in introducing this instrument for any [336] particular purpose, although it is introduced to prove some particular fact or for some particular purpose, it becomes substantive evidence in the case and may be used by the adverse party for other purposes. So that we can get away from this question and not have it confronting us during the remainder of this trial, I am going to admit Exhibits 26, 27, 28 and 29 and counsel then read, at the proper time, any portion they desire to the jury, and then counsel for the plaintiff will be entitled to read any portion of the document that is not read by counsel for the defendant. They are now in evidence.

(Testimony of Hubert Branam.)

Q. Now then, the last question becomes unnecessary and I will ask you, Mr. Branam, where were you on November 4, 1950?     A. At my home.

Q. You were not at the plant that day?

A. No, sir.

Mr. Davis: That is all.

### Redirect Examination

By Mr. Anderson

Mr. Anderson: Perhaps I should have asked this on direct examination.

Q. On some of the steel framework on the substation, Mr. Branam, are there any names stenciled on there besides General Electric?

Mr. Davis: I object to this unless it is [337] shown as of November 4, 1950.

Mr. Anderson: That is right, that should have been included in my question, as of November 4.

A. Yes, sir, there is stenciling on the steel-works.

Q. What was that stenciling?

A. Oregon Short Line Railroad Company, Pocatello, Idaho.

Q. Is there a date on there too?

A. Yes, sir.

Q. Do you remember what that date is?

A. I believe it is 5-15-25.

Q. Do you know what that is on there for?

A. That is the shipping instructions and was the address for the material to be shipped to.

Mr. Anderson: That is all.

(Testimony of Hubert Branam.)

Recross Examination

Q. (By Mr. Davis): That is your conclusion,—that is just what you think, isn't it?

A. I don't know why I should think anything else.

Q. But you didn't work for the Oregon Short Line Railroad Company at that time or any other time, did you?      A. No, sir.

Q. There isn't any place on that structure where Pacific Fruit Express Company is stamped, is there? [338]      A. No, sir.

Mr. Davis: That is all.

Redirect Examination

Q. (By Mr. Anderson): Who were the contractors that built that sub-station?

A. The Oregon Short Line Railroad Company.

Q. Did the Oregon Short Line Railroad Company provide the material?      A. Yes, sir.

Q. Do you know that it was actually shipped to the Oregon Short Line Railroad Company?

A. It would have had to have been.

Mr. Anderson: That is all.

Mr. Davis: Yes, that is all.

HAROLD A. SHOUP

being called as a witness by the defendant, having been first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Anderson): Will you state your name, please?      A. Harold A. Shoup.

(Testimony of Harold A. Shoup.)

Q. And you have previously testified in this case?     A. Yes.

Q. You are the plant manager of the Pacific Fruit Express [339] Company at Pocatello, are you?     A. That is right.

Q. And you were on November 4, 1950?

A. Yes, sir.

Q. When did you first become plant manager at Pocatello?     A. September 1, 1949.

Q. Were you here on November 4, 1950?

A. No, I was not.

Q. Tell me, Mr. Shoup, if you do require any electrical service at the PFE ice plant?

A. Yes, there have been times that we have had to have electrical work done.

Q. How do you obtain that work?

A. We obtain it by employees,—linemen of the Union Pacific.

Q. Do you call them?     A. Yes, sir.

Q. Has that been frequently or otherwise?

A. I think it has been done over a number of years that the PFE has been operating there.

Q. Do you know whether they were called during the years 1949 and 1950?

A. I don't know that, I never called them in 1950.

Q. You hadn't called them?     A. No, sir.

Q. You had no work for them in 1950? [340]

A. Not that I know of.

Q. Now, what about 1949?

A. I don't know about that.

(Testimony of Harold A. Shoup.)

Q. You came here what time?

A. September 1, 1949.

Q. From September on, from September 1st on did you call them that year for any work?

A. I don't recall ever calling them.

Q. When they do any work, do you instruct them what you want them to do?

A. That is right.

Q. And they do what is necessary and then leave? A. That is right.

Q. On November 4, 1950, how many keys were there to the sub-station? A. Two.

Q. Who had possession of them?

A. I had possession of them.

Q. Did the railroad have a key to the sub-station? A. No, they have not.

Q. Men from the railroad come out there once a month to read the meter? A. Yes, sir.

Q. And do you let him in to the sub-station?

A. I or my assistant, yes. [341]

Q. And when those bills are presented, do you approve them? A. Yes.

Q. They come in monthly, do they?

A. Yes.

Q. And you approve them and then what do you do with them?

A. I forward them to San Francisco.

Q. Do you know of any time since you have been out there that any electrician from the railroad has been there and changed the transformer oil in any of the transformers?

(Testimony of Harold A. Shoup.)

A. No, they have not.

Q. Who does that work?

A. We do that ourselves.

Q. At the time,—on or about November 4, 1950, did you have a man working for you that did some electrical work?

A. What was that question again?

Mr. Anderson: Will you read it, Mr. Reporter?

(Question read by reporter.)

A. No, I don't think so.

Q. Since you have been out there, from the time you came up until November 4, 1950, can you tell me what the fact is as to who operated the sub-station?

A. You say who operated the sub-station?

Q. Yes.

A. The Pacific Fruit Express Company. [342]

Q. Out at the Pacific Fruit Express Company plant there, and in your business as manager, do you make any reports at all to the Railroad Company of the activities of the Pacific Fruit Express Company?     A. No, sir, we do not.

Q. Do any of the railroad officials or employees instruct you in your work out there?

A. No, sir.

Q. Who do you take orders from?

A. I take orders from Mr. Branam who is the superintendent and from Mr. L. Edzelson, the general superintendent of refrigeration, and Mr. K. D. Plummer, Vice President and General Manager of the PFE.

(Testimony of Harold A. Shoup.)

Q. Do any of those gentlemen work for the railroad? A. No, sir.

Q. Mr. Branam, that is the gentleman who just testified ahead of you? A. Yes, sir.

Q. I asked Mr. Branam this, but let me ask you too,—is there a so-called hot-stick that you have in your possession to pull the disconnect switches in the sub-station? A. Yes, there is.

Q. Where do you keep it?

A. In the engine room up next to the radiators.

Q. Why do you do that? [343]

A. To keep it dry so that it won't collect moisture.

Q. And that is used for what purpose?

A. For pulling the disconnects with high voltage.

Q. Is that a laminated stick, or do you know?

A. No, that is treated wood but I am sure it is not laminated.

Q. Do you know who, at your plant, has authority to use that stick to pull those disconnect switches?

A. Myself and my assistant or we might designate a shift engineer to pull the disconnects, but we generally take the responsibility to do that ourselves.

Q. On November 4, 1950, Mr. H. O., Johnson was your assistant? A. Yes, sir.

Q. And he is since deceased?

A. That is right.

Q. Has anybody from the railroad company ever come over there and operated that station?

(Testimony of Harold A. Shoup.)

A. No, sir.

Q. Have any of them ever come over and pulled the disconnect switches?     A. No, sir.

Q. By disconnect switches I mean the ones that go to the lightning arresters, is that correct?

A. That is right.

Q. They have not pulled any of them?

A. No, sir. [344]

Q. In the sub-station itself, in addition to these disconnect switches there is a pole-top switch that does disconnect the transformers, is that correct?

A. Yes.

Q. When the disconnects for the lightning arresters and the pole-top switch is pulled, that is the disconnects and the pole-top switch, does that de-energize all the electrical power in that sub-station?

A. The pole-top switch only de-energizes to the transformers.

Q. But that and the disconnect switches to the lightning arresters, do they de-energize all of the power in the sub-station?     A. That is right.

Mr. Anderson: I think that is all.

#### Cross Examination

Q. (By Mr. Davis): Mr. Shoup, I have your testimony or notes on your testimony that when the Union Pacific electricians came out there that you instructed them what to do?

A. We told them what we wanted done,—they

(Testimony of Harold A. Shoup.)

have a foreman there, we just tell them the work that we want done.

Q. And then after you tell them the work that you want done their foreman does the instructing, is that right? A. I would say yes.

Q. Did you ever tell them anything to do? [345]

A. Well, I have told them what we wanted done, I don't think that I ever instructed them as to what to do.

Q. I thought you said, Mr. Shoup, that you didn't ever recall, or that you said that you never called them yourself?

A. I have called them, certainly.

Q. Well, we must be mistaken. I thought that you testified that you had no recollection of calling them, and that you never called anyone from the Union Pacific?

A. We have to call them, how would we get the work done if we didn't call them.

Q. Did you ever call them in 1949?

A. No, sir.

Q. Did you ever call them in 1950?

A. Not that I have any recollection of.

Q. When was it that you called them, that you told them what you wanted done?

A. I think the first time to have any work done was in 1952, I think I stated at that time——

Mr. Casterlin: Not any description of what he had them do, we have no objection as to when he called them or the fact that he did call them, but

(Testimony of Harold A. Shoup.)

a description of what he had them do we object to that.

The Court: Yes, anything that was done by the electricians in connection with that plant after [346] 1950,—after the date of the accident, that would be objectionable.

Q. When you testified that you never called them in 1949 or in 1950, you didn't mean that there was never anyone from the Union Pacific electrical department out there in 1949 or 1950?

A. Not that I have any recollection of.

Q. Other people could call them?

A. I am sure that they would not be doing any work without supervision of the Pacific Fruit Express Company.

Q. I want to know, if you are in a position to say and if you do say that there wasn't anyone from the Union Pacific electrical department out there at that sub-station during 1949?

A. I don't know that.

Q. And you don't know as to 1950?

A. No, sir.

Q. Mr. Shoup, did you yourself ever use that hot-stick?

A. Yes, I had occasion to use it.

Q. What did you use it for?

A. We pulled the disconnect on the secondary bank adjacent to the building.

Q. In this sub-station?                      A. No, sir.

Q. You never did use it in this sub-station?

A. No, sir.

(Testimony of Harold A. Shoup.)

Q. And you never saw it used in this sub-station?

A. Only to pull the pole-top disconnect.

Q. You didn't know until after the accident, after November 4, 1950, that that pole-top switch didn't disconnect all of the power, both in the transformers and the lightning arresters in that sub-station, did you?

A. I think I made that statement, yes.

Q. You know that is in your deposition?

A. Yes.

Q. And you didn't know that until that time?

A. No, sir.

Q. And you thought that when that pole-top switch was pulled that it cut out every bit of electrical current that went into that sub-station, didn't you?

A. Yes, sir.

Q. Now, Mr. Shoup, when you talk about operating it, you operate it as far as the sub-station and the meter reading is concerned, under a written agreement which you have between the Pacific Fruit Express Company and the Railroad Company?

A. That is right.

Mr. Davis: That is all. [348]

### Redirect Examination

Q. (By Mr. Anderson): Counsel asked if you called anyone, any railroad electrician in 1949 or 1950, in other words, he asked if they were out there, I didn't quite get your answer but if there were any out there at all, did you call them?

(Testimony of Harold A. Shoup.)

A. Well, I would say that if they were out there certainly we would have to call them before they came out there.

Mr. Anderson: That's all.

### Recross Examination

Q. (By Mr. Davis): Did I understand you to say you didn't have any electricians on the payroll of the Pacific Fruit Express Company at this plant in November of 1950?     A. That is right.

Mr. Davis: That is all.

Mr. Anderson: That is all, thank you.

### JAMES E. JOHNSON

called as a witness by the defendant, after being first duly sworn, testifies as follows:

### Direct Examination

Q. (By Mr. Anderson): Will you please state your name?     A. James E. Johnson. [349]

Q. And where do you reside?

A. 1122 North Hays, Pocatello, Idaho.

Q. By whom are you employed?

A. The Pacific Fruit Express Company.

Q. Here in Pocatello?     A. Yes, sir.

Q. What department do you work in?

A. I am a stationary engineer.

Q. In the ice plant?     A. Yes.

Q. Are there other departments out there beside the ice plant?

A. Mr. Gibson has a repair shop.

(Testimony of James E. Johnson.)

Q. Is that the car shop? A. Yes.

Q. Is there a store department?

A. Certainly.

Q. And you work in the ice plant, you say?

A. Yes, I work in the ice plant.

Q. How long have you worked for the Pacific Fruit Express? A. Since 1924, for 29 years.

Q. And what is your title?

A. Shift engineer.

Q. Were you the shift engineer on November 4, 1950? A. Yes, sir.

Q. Will you state briefly what are your duties as shift engineer? [350]

A. Well, maintenance of electrical equipment and machinery in general. Operating the ice plant.

Q. Do you have electrical equipment to operate the ice plant with? A. Yes.

Q. I suppose that you know where the sub-station is where LaVerl Johnson was injured?

A. Yes, sir.

Q. You know about that, do you?

A. Yes, sir.

Q. Were you working out there on November 4, 1950? A. Yes, sir.

Q. Do you know what you did in the morning out there, right after you came to work?

A. No, not right after I came to work, I know what we intended to do but I don't know what I was doing right after I came to work.

Q. I see, what time do you go to work?

A. Eight o'clock. There are times that they need

(Testimony of James E. Johnson.)

ice and we didn't start on that particular job that we were to do that day.

Q. After you came to work what did you do out there that day?

A. We were inspecting the transformer oil and taking samples from them.

Q. Was that shortly after you came to work that you started to [351] do that?

A. I would say within a couple of hours.

Q. What did you first do with reference to the inspection of oil in the transformers?

A. We had to unlock the gate.

Q. Did you first go to the sub-station, is that it?

A. Yes.

Q. And who unlocked the gate?

A. Howard Johnson or myself.

Q. Who else was with you?

A. Mr. Judge, Pacific Fruit Express Company electrician, and——

Q. Howard Johnson and yourself and Mr. Judge, is that right?      A. Yes.

Q. What did you do when you got into the sub-station?

A. We have two oil switches that we pulled first and then break the breaker on top of the tower.

Q. The switch that de-energizes the transformer, is that it?

A. Yes, that de-energizes the transformer, that is right.

Q. After you did that,—first let me ask, do you know who pulled that pole-top switch?

(Testimony of James E. Johnson.)

A. I am not positive but I think that I did myself, I was in the habit of doing that when we went in.

Q. And after you pulled that and these two oil switches what did you do?

A. Started to work on the transformers. [352]

Q. You say that you were inspecting the oil?

A. Yes.

Q. What do you do when you are inspecting the oil?

A. Raise the lids and look down at the oil and add oil if need be.

Q. The lid is on top of the transformer?

A. Yes, sir.

Q. How many transformers are in that cage?

A. Three large and two small ones.

Q. What did you do when you got through inspecting the oil in the transformers, did you leave the cage?

A. We locked the cage up and left it.

Q. When you inspected the oil in the transformers there, was there anyone else there with you at that time besides you three, Howard Johnson, Mr. Judge and yourself?

A. Yes.

Q. There were others there?

A. Yes, sir.

Q. Who were they?

A. PFE laborers cleaning the weeds out.

Q. Were there any railroad electricians in there?

A. No, sir.

(Testimony of James E. Johnson.)

Q. Was there anyone from the railroad at all that you saw there?

A. I never saw any there.

Q. At the time you pulled the pole-top switch to de-energize the [353] transformers, did you pull the disconnect switch to de-energize the lightning arresters?     A. No, sir.

Q. Did you leave the transformer cage before the men got through cutting weeds?

A. No, sir.

Q. You and Mr. Judge and Mr. H. O. Johnson were the last ones out?     A. Yes, sir.

Q. Was the gate locked when you went out?

A. Yes, sir.

Q. Were you over around that sub-station the rest of that day?

A. Yes, I was there again.

Q. When was that?

A. When we put the disconnect in after the accident.

Q. When you did what, I didn't get that?

A. When we put the main switches in after the accident.

Q. You mean when you connected up the pole-top switch?     A. Yes, sir, energized it.

Q. Had you completed your oil investigation or your inspection of the transformer oil then?

A. Yes, sir.

Q. And you had not been over around there prior to that time except in the morning as you testified to?     A. No, sir. [354]

(Testimony of James E. Johnson.)

Mr. Anderson: You may cross examine.

Cross Examination

Q. (By Mr. Davis): Are you an electrician, Mr. Johnson? A. No, sir.

Q. Have you ever seen Union Pacific electricians out at the plant there? A. Yes, sir.

Q. Did you ever consult with them concerning your electrical equipment in the plant?

A. Oh, certainly.

Q. Those were the only people that you had to consult with, were they not?

A. Mr. Branam told us what to do.

Q. Who did? A. Mr. Branam.

Q. He told you what to do? A. Yes.

Q. When you wanted to know something about electricity or had an electrician's problem at the plant you consulted with the Union Pacific men, didn't you? A. No, sir.

Q. I thought you said that you did?

A. We talked about it but I never asked about any trouble that [355] I ever had.

Q. You never did? A. No, sir.

Q. Do you know any of the Union Pacific electricians? A. Yes, sir.

Q. Which ones do you know?

A. I know Mr. Fetchel.

Q. Anyone else?

A. Well, I know the boys that were coming out there but I don't know their names.

Q. Didn't the boys that came out there,—you

(Testimony of James E. Johnson.)

say that you know who they were but didn't know their names?     A. Yes, sir.

Q. Did you know Mr. Eskilson, the foreman who read the meters?     A. Yes, sir.

Q. And those Union Pacific employees, whether you knew their names or not, they knew that you were checking the transformer oil, that you did that?

A. I couldn't tell you that, they knew that we were taking care of it but I don't know how the reports went in or anything like that.

Q. But they knew that you people took care of the checking of the oil yourselves?

A. I presume they did, yes, sir.

Mr. Davis: That's all. [356]

Mr. Anderson: That's all.

### MELVIN JUDGE

called as a witness by the defendant, after being first duly sworn, testifies as follows:

#### Direct Examination

Q. (By Mr. Anderson): Will you please state your name?     A. Melvin Judge.

Q. Where do you reside?

A. Pingree, Idaho.

Q. What is your business or occupation?

A. Electrician.

Q. Where do you work now?

A. I am working at the AEC project for the Cache Valley Electric.

(Testimony of Melvin Judge.)

Q. Over near Arco? A. Yes, sir.

Q. How long have you been working for them?

A. I have been working about two weeks now, for them.

Q. What kind of work are you doing?

A. Inside wiring, electrical maintenance work.

Q. How long have you been engaged in electrical work?

A. I have worked at it for close to 20 years now.

Q. Have you ever done any work on high voltage electricity?

A. Yes, I worked for the Idaho Power Company in Salmon and [357] I worked for the Pacific Fruit Express on maintenance at the new car plant they built there.

Q. You mean here in Pocatello?

A. Yes, sir.

Q. About when did you go to work for the PFE?

A. I went to work for them the last of September, the year of the accident.

Q. September of 1950? A. Yes, sir.

Q. On November 4, 1950, did you have occasion to go into this sub-station at the Pacific Fruit Express plant?

A. Yes, I went in the sub-station because I had checked the oil on the transformers in the new PFE place and so we worked together on all of them.

Q. What time of the day did you go to the sub-station?

(Testimony of Melvin Judge.)

A. I went to work at eight o'clock in the morning and I went to the ice plant, we had to find the bottles to get the samples of the oil and then went to work on the sub-station soon after that.

Q. Did you go into the sub-station that morning?     A. Yes, sir.

Q. Who did you go in with?

A. James Johnson, Howard Johnson, and those laborers went in.

Q. James Johnson who just testified?

A. Yes, sir. [358]

Q. Who let you into the sub-station?

A. It was James or Howard Johnson, I don't recall which one unlocked the gate.

Q. One of them unlocked the gate?

A. Yes, sir.

Q. After you got in, what did you do?

A. Well, I checked there while they made sure they disconnected the switches,—that was the ice plant's work and they disconnected or pulled the two oil switches and then the air break switch on top that killed all of the power except what went to the lightning arresters.

Q. Was your work that day in connection with transformers?     A. Yes, sir.

Q. And when that top pole switch was pulled at the sub-station, did it de-energize the rest of the transformers throughout the PFE system out there?

A. Yes, sir.

Q. Were you checking all of the transformers that day?

(Testimony of Melvin Judge.)

A. Yes, taking samples of the oil and checking all of them.

Q. At the time that you were in this transformer station or sub-station that morning, after the switches were pulled, you were checking the transformers, were there any railroad laborers or employees in there or anybody for the railroad?

A. No, sir. [359]

Q. Just the three of you?

A. Yes, and the laborers that were cutting weeds in the sub-station.

Q. Did they leave before you did, I mean the laborers?

A. Yes, they went out before we did.

Q. Were you ever back over around the sub-station after that, that day?

A. No, sir.

Q. Your work took you somewhere else?

A. Yes, we finished on the transformers over in the car shop and so, I had my car over there and James Nelson went back and turned the power on and I went home from there.

Q. At that time did you hold a state license as an electrician?

A. Yes, sir.

Q. State whether or not this was the first time that you had ever been in that sub-station?

A. Yes, it was the first time.

Mr. Anderson: I think that is all.

#### Cross Examination

Q. (By Mr. Davis): What kind of car did you have?

A. I have a Ford '49.

(Testimony of Melvin Judge.)

Q. You didn't have any printing or name on the side of it? A. No, sir.

Q. Now, as I understand it, when you were there, there were [360] no Union Pacific electricians there? A. No, sir.

Q. You don't know whether there were any in there any other time that day? A. No, sir.

Q. The checking of the oil of the transformers with 12,500 volts of electricity, that is work and a job for an electrician, work that an electrician should do? A. Yes.

Q. And that is no job for a layman?

A. No, it should be done by an electrician.

Q. Did you know when you were in there that there was energy in these lightning arresters after the top switch was pulled? A. Yes, sir.

Q. You knew that? A. Yes, sir.

Q. And you saw laborers working in there, cutting weeds?

A. Yes,—they were warned that the power was still on the lightning arresters at that time.

Q. Of the people that were in there, who warned them that the power was in the lightning arresters?

A. James Johnson.

Q. Mr. James Johnson and Howard Johnson both knew that the power was in the arresters?

A. Yes, sir.

Q. Did you ever go there with Mr. Shoup?

A. No, sir.

Q. You never did? A. No, sir.

(Testimony of Melvin Judge.)

Q. This was the only time that you were in there?

A. Later on that day but not before.

Q. Not before November 4, 1950?

A. No, sir.

Q. When you went out of there was that left disconnected or was it put back in position?

A. It was left disconnected and the gate locked.

Q. Do you know how long it was left disconnected that day and the pole-top switch pulled?

A. It was left disconnected until we finished checking the oil in the transformers and then James Johnson went over, after we finished and turned the power on. At that time I left to go home.

Q. Now, the power was turned on before you left the plant?

A. No, sir, he went to turn it on as I left.

Q. He went over to turn it on?

A. Yes.

Q. Now, let's get that straight, Mr. Judge, what time did you leave?

A. I cannot recall just now but it was towards the end of the [362] day, I cannot say the exact time.

Q. What time did you first go in there?

A. I started to work at eight o'clock and I went to the ice plant to hunt these bottles that they kept the oil samples in, after we found them we went into the sub-station,—I never checked the time.

(Testimony of Melvin Judge.)

Q. Would it be nine o'clock, or tell me what is your best estimate?

A. Somewhere around nine o'clock.

Q. How long were you in there?

A. We was in there, I would guess possibly an hour or an hour and a half.

Q. And then you went out, the gate was locked and the switch was left pulled?

A. Yes, sir.

Q. And then what did you do, did you go to lunch?

A. No, checked the transformer at the ice plant, in the small transformer vault outside of the ice plant, and we finished that about noon.

Q. Then what did you do?

A. In the afternoon we went to check the transformer on the PFE car plant.

Q. When you came back in the afternoon was the energy still off?

A. I never went to the station but we figured that it would [363] be because we locked the gate and the keys were turned over to the ice plant.

Q. You figured and it was generally understood that the power would be off while you were making this inspection that day?     A. Yes, sir.

Q. You don't know whether it stayed off all day, but you think that it did?     A. Yes, sir.

Q. When did you see James Johnson go back to turn the power on?

A. James Johnson went back that evening after we finished with the transformers. His car was at

(Testimony of Melvin Judge.)

the ice plant and he went to turn it on, I had my car over by the car shop and so I went on from there.

Q. That was after this accident?

A. Yes, sir.

Q. Where were you at the time LaVerl Johnson got hurt?

A. I was on top of a pole by the office at the PFE plant, they had one old transformer there and the oil was bad in it, we were draining the oil and they didn't have enough oil to fill it so Charlie Gibson came out and Howard Johnson and Mr. Gibson went to the Idaho Power to get oil to finish filling the transformer. They were gone quite a long time and when they came back they said about Mr. Johnson getting burned over there at the station. [364]

Q. As an electrician, you felt that it was safe for those laborers to be in the enclosure there with energy in the lightning arresters?

A. No, sir, I didn't figure that it was safe.

Mr. Davis: That's all.

### Redirect Examination

Q. (By Mr. Anderson): Did you say that these laborers were instructed?

A. Yes, they were instructed that the power was in the lightning arresters.

Q. Did any of them get hurt?

A. No, sir.

Mr. Anderson: That's all.

Mr. Davis: That is all.

Mr. Anderson: At this time, if the Court please, I think I would like to read these contracts.

The Court: You may do so.

Mr. Anderson: They are Exhibits 26, 27, 28 and 29. Exhibit No. 26 reads: "ACE 6085; Audit No. 13133" and in pencil: "1775E.

"This agreement, made and entered into this first day of March, 1924, by and between the Oregon Short Line Railroad Company, a corporation of the State of Utah, hereinafter called Railroad Company, party of the first part, and the Pacific Fruit Express Company, a corporation [365] of the State of Utah, hereinafter called Pacific Company, party of the second part, Witnesseth:

"That whereas, in the operation of its railroad, the Railroad Company owns and operates extensive shop and terminal facilities at Pocatello, Idaho, and purchases electric power from the Idaho Power Company for use in connection with the operation of said facilities; and,

"Whereas, the Pacific Company is handling the refrigeration work of and for the Railroad Company at Pocatello, Idaho, and in connection with the handling of said refrigeration desires to secure from the Railroad Company, electric power for use in connection with said refrigeration; and

"Whereas, the Idaho Power Company is under contract with the Pacific Company which contract provides that in case the said Idaho Power Company furnishes power to the Railroad Company at a different rate than that provided in said contract then the Pacific Company can secure power through

the Railroad Company as herein provided, and,

“Whereas, the Idaho Power Company has now made a contract with the Railroad Company in which the Idaho Power Company agrees to furnish power to the Railroad Company at a different rate than that provided in said [366] contract between the Idaho Power Company and the Pacific Company;

“Now therefore, this agreement witnesseth:

“1. The Railroad Company will construct pole and wire lines and a 600 KVA transformer station necessary for the delivery of power at approximately 2300 volts and 60 cycles to the Pacific Company hereunder, maintenance, repairs, renewals and changes in said constructions shall be made by the Railroad Company at the cost and expense of the Pacific Company.

“2. The Pacific Company agrees to receive power at a point of delivery to be agreed upon between the parties hereto and at its own expense to install and maintain all equipment necessary for the application of said power beyond the point of delivery.

“3. The Pacific Company agrees to reimburse the Railroad Company for the cost of the installation, maintenance, repair and renewal of said pole and wire lines, transformer station and all other apparatus and equipment installed by it for the delivery and measurement of electric current delivered to the Pacific Company under this agreement.

“4. The Pacific Company agrees to pay to the Railroad Company for the electric power delivered under this agreement the same average rate per KW hour as the [367] Railroad Company pays to the Idaho Power Company, plus ten per cent which is to include the transmission line and transformer losses and the fixed charges and maintenance on such railroad equipment and apparatus as is used by the Railroad Company for delivering electric power to the Pacific Company.

“5. The Railroad Company will install and maintain, at the expense of the Pacific Company, standard meters to measure the electric service used by the Pacific Company, and will inspect such meters from time to time.

“6. The Railroad Company, at any time upon the written request of the Pacific Company will test the meter of said Pacific Company within 30 days after receipt of such request, and the Pacific Company agrees to accept the result of such test, as a basis for the settlement of the Pacific Company's account. If any such test shall show the average error of the meter to be less than three per cent, the Pacific Company shall pay the expense of the test; except, that where the meter has not been tested at the request of the Pacific Company, within the 12 months' period immediately preceding such request, the test will be made without charge to the Pacific Company. The Railroad Company may at any time, at its own expense, test any of the meters. An average error of more than three per cent will be considered in determining the Pacific

[368] Company's use of electric service, the Railroad Company refunding where the meter is fast and the Pacific Company paying the difference where it is slow.

"7. If the Railroad Company's meters shall fail to register at any time, the service delivered and energy consumed during such failure, in the absence of a more accurate basis, may be determined on the basis of the nearest corresponding equal period of use when there was no such failure, subject to corresponding credit to the Pacific Company for any nonuse during any such failure. If any appliances or wiring connections shall be found on Pacific Company's premises which prevent the meters from accurately recording the total amount of energy used on the premises, the Railroad Company may at once remove such wiring or appliances at the Pacific Company's expense, and may estimate the amount of energy so consumed and not registered, as accurately as it is able so to do, and the Pacific Company will immediately pay for such energy.

"8. The average error of a meter is defined as one-half of the algebraic sum of: (1) The error at light load, and (2) The error at heavy load. Light load shall be considered to mean approximately 5 per cent to 10 per cent of the rated capacity of the meter. Heavy load shall be considered to mean not less than 60 per cent nor more than 100 per cent of the rated capacity of the meter. No [369] meter will be installed which has an error of more than plus 2 per cent or minus 3 per cent at light

load, or plus or minus 2 per cent at heavy load. Whenever an installation, periodic or any other test a meter is found to exceed these limits, it will be adjusted or replaced.

“9. Bills properly chargeable to the Pacific Company hereunder shall be paid by the Pacific Company within 30 days after presentation by the Railroad Company.

“10. In case the Railroad Company shall, at any time, during the term hereof, generate in its own plant all or part of the electric power used at the Pocatello terminal, the Pacific Company agrees to pay to the Railroad Company for electric power delivered under the terms hereof at such new rate as may be specified by the Railroad Company; such new rate to be equal to the cost including fixed charges plus 10 per cent. The cost to be determined by the Railroad Company. In case the new rate is not satisfactory the Pacific Company may terminate this agreement at any time by giving to the Railroad Company 30 days written notice of its intention so to do.

“11. Either party may terminate this agreement at any time after one year from the date hereof by giving to the other party 90 days notice in writing.

“12. The Railroad Company being dependent upon the Idaho Power Company for power does not guarantee the [370] delivery of any specific amount of electric power under this agreement or the delivery of power for any specific period or an uninterrupted supply of electric power, and in case a limited supply of electric power is, for any

period of time, furnished to the Railroad Company, it will distribute such supply, as between the parties hereto, to the best advantage, giving due consideration to the relative importance of the various units to be operated and the amount of electric power available.

“15. The servants and employees of the Railroad Company, while engaged on the construction, reconstruction, alteration, maintenance, repair, renewal or operation of said transformer station and wire line shall be considered to be the servants and employees of the Pacific Company.

“16. This agreement shall take effect on the first day of March, 1925, and unless sooner terminated as herein provided, shall remain in force until the 28th day of April, 1929.

“17. This agreement shall inure to and be binding upon the successors in interest of the parties hereto.

“In Witness Whereof, the parties hereto have caused this agreement to be executed on the day and year first above written. Oregon Short Line Railroad Company by C. R. Gray, its president. Witness: F. J. Melia. Attest: C. B. Mattha, Assistant Secretary. Pacific Fruit [371] Express Company, by H. Giddings, its Vice President and General Manager. Witness: Fred Garrigues. Attest: G. S. King, Assistant Secretary. Approved as to form, John Bannewitz, Contract Attorney. A. H. Babcock, Electrical Engineer. Approved, H. V. Platt, General Manager; Approved, W. R. Armstrong, Assistant Chief Engineer; Approved as to

form, George H. Smith, General Attorney; Approved as to execution, George H. Smith, General Solicitor.”

Mr. Davis: I would not suggest this if the paragraphs were not short but in order that this may be more readily understood could we have the two paragraphs read at this time.

The Court: Yes, you may.

Mr. Anderson: As to that, your Honor, on this contract I would like to make an objection to the proposal of Mr. Davis, because, so far as this case is concerned these two paragraphs have nothing to do with this case whatever. I think it is very similar to making an objection to some question asked of a witness on the stand that it may be incompetent, irrelevant and immaterial and this portion is also incompetent, irrelevant and immaterial as to the issues of this case and we make that objection.

The Court: There was some question came [372] up with regard to the interest of witnesses connected with the PFE or their interest. I think a great deal of a contract and I think a great deal of the contract that you have read here, but in my opinion I think it is all immaterial and not necessary but the Court feels that if any part of a contract is read to the jury that the jury would be confused as to any portion that is not read and I think it should be in the record, the portion eliminated would confuse this jury. It goes to the question of interest. You may read the two paragraphs as you request, Mr. Davis.

Mr. Davis: Paragraph No. 13 which was omitted

by Mr. Anderson is as follows: "13. Neither the Railroad Company nor the Pacific Company shall be liable to the other for any act or omission caused directly or indirectly by strikes, labor troubles, accidents, litigation, United States, state or municipal interference, or other causes not due to negligence, but the cause producing such act or omission shall be removed with all reasonable diligence." And the next paragraph omitted: "14. The Pacific Company will indemnify, save harmless and defend the Railroad Company against all claims, demands, costs or expense for death of or injury to persons or loss of or damage to property, in any manner directly or indirectly connected with or growing out of the transmission or use of electric service by the Pacific Company, at or on the [373] Pacific Company's side of the point of delivery."

The Court: You may now proceed, Mr. Anderson.

Mr. Anderson: I overlooked calling your Honor's attention to the fact that this contract expired on the 28th day of April, 1929.

The Court: This contract expired on the 28th of April, 1929?

Mr. Anderson: Yes, this was just a construction contract and I think that portion read by Mr. Davis should be stricken, or the jury should be instructed to disregard what Mr. Davis read.

The Court: And then I better instruct them to disregard what you read too, hadn't I?

Mr. Anderson: No, because it leads right up to

the question of ownership, that has to do with the construction and leads right up to this question.

The Court: I thought that if I let a part of this contract in without having it all that the jury would be confused, and now you have me confused, you say that the contract expired on the 28th of April, 1929, and still you want to leave a part of it in this record and take a part out.

Mr. Anderson: As I say, your Honor, it has to do with the construction and ownership, that was the [374] purpose.

The Court: I will take your motion under advisement and I will read it again.

Mr. Anderson: And now, with the Court's permission, I will read Exhibit No. 27 to the jury.

The Court: You may do so.

Mr. Anderson: This is Exhibit No. 27: "Contract Department No. C-10475". Also in blue pencil, "1775-E Lease; ACE No. 8298 Audit No. 6978 from Oregon Short Line Railroad Company to Pacific Fruit Express Company. Transformer site at Pocatello, Idaho." Then follows a mailgram: "Pocatello, Idaho, April 29, 1926. W. S. Ure Salt Lake Your mailgram of the 28th inst. and previous correspondence relative to contract audit No. 13133 with Pacific Fruit Express Company. This service was first started for the PFE Company on August 28, 1925, the first charge appearing therefor was on September, 1925, bill. D-187. A C Hinckley. Original filed with contract audit No. 13133.

"This supplemental agreement, made and entered into this 23rd day of February, 1926, by and

between Oregon Short Line Railroad Company, a corporation of the State of Utah, hereinafter called "Railroad Company", party of the first part and the Pacific Fruit Express Company, a corporation of the State of Utah, hereinafter called "Car Line", party [375] of the second part, witnesseth:

"Recitals: the parties hereto are parties to an agreement dated February 11, 1916, which, among other things, contains provisions relating to the leasing by the Railroad Company to the Car Line of property of the Railroad Company for certain purposes therein set forth; and the parties hereto are also parties to an agreement dated on the 1st of March, 1924, which provides for the furnishing of electric power to the Car Line by the Railroad Company. The Car Line now desires to lease from the Railroad Company, certain property at Pocatello, Idaho, hereinafter more specifically described.

"Agreement: Now, therefore, it is mutually agreed by and between the parties hereto as follows, to wit:

"Section one. The Railroad Company hereby leases to the Car Line a transformer and transmission line site at Pocatello, Idaho, as more fully described and set forth in the schedule and plat marked Exhibit A and B, respectively, hereto attached and hereby made a part of this agreement.

"Section two. The value of the leased premises shown on Exhibit B is 13 and 20-100 dollars, as per detail set forth in Exhibit A. In addition to the rental to be paid for the use of the property above referred to the Car Line hereby agrees to

pay to the Railroad Company as rental for the property occupied by transmission lines as [376] herein provided, five and no-100 dollars per annum.

“Section three. This lease shall be subject to all of the terms and conditions with respect to rental and otherwise, except as provided in Section two and Section four hereof, contained in said agreements of February 11, 1916, and the 1st day of March, 1924, to which this agreement is supplemental, and the parties hereto severally agree for themselves, their successors and assigns, to be bound by all of said terms and conditions.

“Section four. This agreement shall take effect as of the date on which the power is delivered to the Car Line under said agreement of March 1, 1924, and shall continue in full force and effect for a period of one year and thereafter until terminated on the last day of any month by either party hereto giving to the other party written notice on or before the last day of the preceding month of its intention so to terminate the same.

“In witness whereof, the parties hereto have caused this agreement to be executed in duplicate as of the day and year first herein written. Oregon Short Line Railroad Company by E. E. Calvin, its Vice President, witness J. S. Sykes. Pacific Fruit Express Company by H. Giddings, its Vice President and General Manager, Attest, G. S. King, Assistant Secretary. Location and description correct, H. T. Whyte, Assistant General [377] Manager by”, and I cannot make out that signature and it further is: “Approved H. V. Platt, General

Manager. B. H. Prater, Assistant Chief Engineer. Form approved: George H. Smith, General Attorney; John A. Beniwitz, Contract Attorney. Execution approved: George H. Smith, General Solicitor." Attached to that is Exhibit A which is: "Exhibit A. Oregon Short Line Railroad Company. Schedule showing value of land of the Oregon Short Line Railroad Company, at Pocatello, Idaho, leased to the Pacific Fruit Express Company.

"Land occupied by transformer station and transmission line. Transformer station: 15 feet by 22 feet equals 330 square feet at \$.04 per square foot equals \$13.20.

"Beginning at a point which is 153.0 feet perpendicularly distant southwesterly from the center line of double main tracks of the Oregon Short Line Railroad at engineer's station 11377 plus 78.0, which station is 98.1 feet southeasterly measured along the center line of double main tracks from its intersection with the north line of section 27, township 6 south, range 34 east, Boise Meridian; thence northwesterly and parallel to center line of double main tracks a distance of 15.0 feet; thence at right angles southwesterly a distance of 22.0 feet; thence at right angles a distance of 15.0 feet [378] southeasterly; thence at right angles a distance of 22.0 feet northeasterly to point of beginning.

"Also a site for a transmission line extending from the above described property to an existing pole of the railroad company 38.0 feet perpendicularly distant northeasterly from said center line of

double main tracks at engineer's station 11377 plus 78.0.

“Also a site for a transmission line from the above described property to a point in the right-of-way boundary line 181.0 feet perpendicularly distant southwesterly from the said center line of double main tracks at engineer's station 11378 plus 74.0.”

Exhibit B is a blueprint on which is outlined in yellow the sub-station lease and a line which extends across the tracks to the OSL transmission line.

Now, I will read Defendant's Exhibit No. 28: “1775-E. L and T No. 10696. Audit No. 9145.

“This agreement made and entered into this 19 day of July, 1932, by and between Oregon Short Line Railroad Company, a corporation of the State of Utah, hereinafter called Lessor, party of the first part, and Pacific Fruit Express Company, a corporation of the state of Utah, hereinafter called Lessee, party of the second part, witnesseth: [379]

“Section 1. The lessor, for and in consideration of the covenants and payments hereinafter mentioned to be performed and made by the lessee, hereby agrees to lease and let and does hereby lease and let unto the lessee for the term hereinafter specified, the following described premises of the lessor, together with the trackage located thereon, at Pocatello, Bannock County, Idaho, to-wit:

\* \* \* \* \*

Mr. Anderson: “A piece or parcel of land to be

used for a transformer site, described as follows to-wit:

“Beginning at a point which is 153.0 feet perpendicularly distant southwesterly from said center line of the double main track roadbed, at engineer’s station 11377 plus 78.0, which is 98.1 feet southeasterly measured along said center line from its intersection with the north line of said section 27; thence parallel [380] to said center line 15.0 feet northwesterly; thence at right angles 22.0 feet southwesterly; thence at right angles 15.0 feet southeasterly; then at right angles 22.0 feet northeasterly to the point of beginning, as indicated outlined and shaded in yellow on the print marked Exhibit B, which is hereby made a part hereof.

“The above described premises, including the trackage of the lessor located thereon, are hereinafter referred to as leased premises.

“Section 2. The lessee is also granted the right and license, subject to the observance and performance by the lessee of all and singular the conditions, covenants and agreements hereinafter contained to be by the lessee kept, observed and performed, to continue, during the term hereof, to maintain and operate to existing transmission lines, including the connection of one of them with the existing transmission line of the lessor, over and across a portion of the right-of-way of tracks and wires of the lessor in the locations described as follows, to-wit:

“One of said transmission lines extends from an existing pole of the lessor, which is 38.0 feet north-

easterly, measured at right angles from the center line of the double main track roadbed of the Oregon Short Line Railroad at engineer's station 11377 plus 85.3, [381] southwesterly 191.0 feet to the above described transformer site and crosses the aforesaid center line at right angles at engineer's station 11377 plus 85.3 which is 90.8 feet southeasterly measured along said center line from its intersection with the north line of section 27, township 6, south, range 34 east Boise Meridian.

“The other of said transmission lines extends from the above described transformer site northwesterly for a distance of 88.7 feet, more or less, to a point in the southwesterly right-of-way boundary of the Oregon Short Line Railroad 181.0 feet southwesterly, measured at right angles, from said center line of engineer's station 11378 plus 74.0, which is 9.4 feet southeasterly measured along said center line from its intersection with the north line of said section 27.

“The location of said transmission lines are substantially as indicated by dashed and dotted yellow lines and yellow circles on the aforesaid Exhibit B.

“Section 3. The lessee agrees to pay to the lessor for the use of the leased premises, rental at the rate of \$2,305.35 per annum, payable annually in advance. In addition to the foregoing rental the lessee agrees to pay to the lessor, for the right and license granted the lessee in Section 2 hereof, rental at the rate of \$5.00 per annum, payable annually in advance. Acceptance of [382] said rentals in advance by the lessor shall not act as a waiver of its

right to terminate this lease and agreement as hereinafter provided.

“If, during the term of this lease and agreement, any street or other improvements, whether consisting of new construction, maintenance, repairs, renewals or reconstruction shall be made, the whole or any portion of the cost which is assessed against or fairly assignable to the leased premises, the lessee agree to pay in addition to the other payments herein provided for 6 per cent per annum on the amount so assessed against or assignable to the leased premises during the remainder of the term of this lease and agreement from and after the date the expenditure by the lessor of such amount is made.

“The lessee further agrees to pay before the same becomes delinquent, all taxes levied during the continuance of this lease and agreement upon the leased premises and upon any improvements made upon the leased premises by the lessee.

“Section 4. The lessee covenants that the leased premises shall not be used for any other purpose than for light repair yard, shop, icing platform and transformer sites, and agrees that if the lessee abandons the leased premises, the lessor may enter upon and take [383] possession of the same.

“Section 5. The lessee agrees not to let or sub-let the leased premises, in whole or in part, or to assign this lease and agreement without the consent in writing of the lessor, and it is agreed that any transfer or assignment of this lease and agreement, whether voluntary, by operation of law or other-

wise, without such consent in writing, shall be absolutely void and, at the option of the lessor, shall terminate the same.

“Section 6. The lessee covenants and agrees that all buildings and all other structures erected upon the leased premises during the term hereof shall be of substantial design and construction and of a design and type satisfactory to the lessor, shall be painted by the lessee a color satisfactory to the lessor, and shall at all times be kept in good repair; that the roof of each such building shall be of fire resistive material, and when any building is without solid foundation the openings between the ground and the floor thereof shall be covered with fire resistive material; that in the construction, occupancy and use of said buildings and structures and in the use of the leased premises the lessee shall conform to all laws, ordinances and other public regulations now in effect or which may hereafter be enacted. [384]

“Section 7. The lessee shall fully pay for all materials joined or affixed to said premises, and shall pay in full all persons who perform labor upon said premises and shall not permit or suffer any mechanic's or materialman's of any kind or nature to be enforced against said premises for any work done or materials furnished thereon at the instance or request or on behalf of the lessee; and the lessee agrees to indemnify and hold harmless the lessor from and against any and all liens, claims, demands, costs and expenses of whatsoever nature in any way connected with or growing out of such work done,

labor performed or materials furnished." I am skipping Section 8.

"Section 9. Except as provided in Section 2 hereof the lessee shall not locate or permit the location or erection of any poles upon the property of the lessor, nor of any beams, pipes, wires, structures or other obstruction over or under any tracks of the lessor without the consent of the lessor." I am leaving out Sections 10 and 11.

"Section 12. It is further agreed that the breach of any covenant, stipulation or condition herein contained to be kept and performed by the lessee, shall, at the option of the lessor, forthwith work a termination of this lease and agreement, and of all rights of the lessee hereunder; that no notice of such termination or [385] declaration of forfeiture shall be required, and the lessor may at once re-enter upon the premises and repossess itself thereof and remove all persons therefrom or may resort to an action of forcible entry and detainer, or any other action to recover the same. A waiver by the lessor of the breach by the lessee of any covenant or condition of this lease and agreement shall not impair the right of the lessor to avail itself of any subsequent breach thereof.

"Section 13. This lease and agreement shall be retroactive to the 16th day of June, 1930, and shall continue in full force and effect for a period of one year from the date first herein written and thereafter until terminated on the last day of any month by either party hereto giving to the other party written notice on or before the last day of the pre-

ceding month of its intention so to terminate the same.

“Section 14. The lessee covenants and agrees to vacate and surrender the quiet and peaceable possession of the premises upon the termination of this lease and agreement howsoever. Within 30 days after the termination of this lease and agreement howsoever, the lessee shall, at its own expense, remove from the premises all property not belonging to the lessor. The lessor hereby acknowledges the title of the lessee in and to the improvements, other [386] than the trackage of the lessor forming part of the premises described in Section 1 hereof, located on the leased premises as of June 16, 1930.

“Section 15. This lease and agreement supersedes and terminates as of the effective date hereof and previous agreements of lease between the parties hereto, dated respectively the 20th day of January, 1925; the 25th day of September, 1929; the 23rd day of February, 1926; and the 10th day of December, 1926; designated in the files of the lessor as leases ACE No. 7948, audit No. 6680, supplement to ACE No. 7948, audit No. 6680; ACE No. 8298, audit No. 6978; and ACE No. 8845, audit No. 7239 respectively; which said agreements provide for the leasing to the lessee by the lessor of certain property of the lessor at Pocatello, Idaho, for yards and light repair shop site, transformer and transmission line site and for an icing platform site.

“Section 16. Subject to the provisions of Sec-

tion 5 hereof, this lease and agreement shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns. In witness whereof, the parties hereto have caused this lease and agreement to be executed in duplicate as of the date first herein written. Oregon Short Line Railroad Company by William Jeffries, its Vice President. Witness: F. J. Delehanty. Pacific Fruit [387] Express Company by H. Giddings, its Vice President and General Manager. Witness: C. O. Hivelin. Attest: G. S. King, Assistant Secretary. Valuation location and description approved: H. T. Whyte, Assistant General Manager, by H. T. Whyte."

Attached to these are two blue prints. The first is marked Exhibit A and refers to the lease of property other than the transformer site and Exhibit B has reference to the lease of the transformer site and the transmission lines across the track over to the ice plant which are all shown in yellow on the blueprint.

Mr. Davis: Now, if the Court please, may we read these portions which we desire, that were omitted by Mr. Anderson.

The Court: Yes, you may.

Mr. Davis: I will read Section 10.

Mr. Anderson: Just a moment, Mr. Davis, we object to the reading of these sections, because this has nothing to do with this suit and we are not trying out anything else other than what is confined to the issues here. It is wholly incompetent,

irrelevant and immaterial and just has nothing to do with this case.

The Court: I requested authorities on this matter and, of course, none were handed to me. I did some work and all of the authorities that I can [388] find are to the effect that when one part of a writing is presented then the opposing side was entitled to have it all. In view of the fact that there is no ruling to the contrary presented to the Court I will permit the reading of this part.

Mr. Davis: "Section 10. The lessee shall be liable for any and all injury or damage to persons or property of whatsoever nature or kind, arising out of or contributed to by any breach, in whole or in part, of any covenant of this lease and agreement.

"Section 11. The provisions relating to liability contained in that certain agreement between the Union Pacific Railroad Company, the lessee, and the Southern Pacific Company dated July 28, 1928, concerning the protection of perishable freight in transit, and any amendment thereof or supplement thereto, shall govern as between the parties hereto in the matter of liability for loss of or damage to property or injury to or death of persons occurring in any way incident to the lessee's occupation and use of the premises herein leased, or the lessee's use and enjoyment of the right and license herein granted."

Mr. Casterlin: We move to strike that on the ground that Section 10 has to do with liability for [389] breach of contract as between the parties

thereto. This case is not predicated on any breach of contract and this suit is not between the PFE and the Union Pacific and that is all that Section 10 has to do with. Now, Section 11 has to do with the liability of freight or rather for freight in transit. This case does not involve any freight in transit and there is no liability by reason of that fact. It goes on to say,—and I am paraphrasing somewhat, any amendment to the agreement of July 28, 1928, or any supplement thereto shall govern the parties therein in certain respects. That is unintelligible because in the first place the contract of July, 1928, is not in evidence,—

The Court: I think you have a point there, Mr. Casterlin, there should be another contract so that we could understand what this is about. I think that you will admit that for me to sort out what is pertinent,—and I might say that I doubt that any of this is pertinent, of course, I want to say to the jury that they will pay no attention to my remarks here,—but for me to figure out what should be admitted and what should not be admitted here now of these instruments, that would be quite a task.

Mr. Casterlin: The theory on which they were admitted was that the Union Pacific Railroad Company has nothing to do with the ownership and nothing to do with [390] the operation or maintenance or the ownership of this sub-station or the line from the Batiste line, leading over to this line.

The Court: And now, Mr. Casterlin, you are arguing the case. The evidence is for the jury to

weigh and to determine whether it is true or not. I am a little in doubt as to this question as to the entire contract, first as I recall, it was objected to on the part of the plaintiff and then on the part of the defendant as to admitting all of the contract.

Mr. Casterlin: If the Court please, that was for the purpose of confining the exhibits to the purpose for which they were offered and not letting this case go too far afield.

The Court: I have ruled now, however, I will say that I will take your motion under advisement.

Mr. Anderson: Exhibit No. 29: "Contract Department No. 17566A. 1775E. Oregon Short Line Railroad Company Lease Audit No. 9145. Supplement No. one to lease. L and T No. 10696. Audit No. 9145 from Oregon Short Line Railroad Company, Union Pacific Railroad Company to Pacific Fruit Express Company. Increased area for maintenance and operation of transformer at Pocatello, Idaho.

"Supplement No. One, Lease L and T No. 10696.

"This supplemental agreement, made and entered [391] into this 24th day of November, 1942, by and between the Oregon Short Line Railroad Company, a corporation of the State of Utah, and its lessee, Union Pacific Railroad Company, a corporation of the State of Utah, hereinafter collectively called, lessor, parties of the first part, and the Pacific Fruit Express Company, a corporation of the State of Utah, hereinafter called lessee, party of the second part, witnesseth:

“Recitals: On the 19th day of July, 1932, the Oregon Short Line Railroad Company and the lessee herein entered into a written agreement of lease, designated in the files of the lessor, as lease CE No. 10696, audit No. 9145, under the terms of which certain space on the right-of-way of the lessor at Pocatello, Bannock County, Idaho, together with the trackage thereon, were leased to the lessee for the maintenance and operation of yards, light repair shop, transformer, transmission line and icing plant, for an indefinite term.

“It is now the desire of the parties hereto to supplement and amend the aforesaid lease of July 19, 1932, to provide for the use by the lessee of an increased area for the maintenance and operation of the aforesaid transformer, described in said lease and shown on Exhibit B attached thereto, and to provide for an increase in the amount of rental to be paid by the lessee therefor. [392]

“Agreement: It is, therefore, covenanted and agreed, by and between the parties hereto as follows, to-wit:

“(1) Premises: Paragraphs 4 and 5 of Section 1 of the aforesaid lease of July 19, 1932, are hereby amended to read as follows:

“A piece or parcel of land to be used for a transformer site, described as follows:—

The Court: Do you need to read the description, Mr. Anderson?

Mr. Anderson: I take it that is not necessary, your Honor, and I will not read the description but go to Paragraph 2.

“(2) Rental: Section 3 of the aforesaid lease of July 19, 1932, is hereby amended to read as follows:

“The lessee agrees to pay to the lessor for the use of the leased premises, rental at the rate of \$2,307.01 per annum, payable to the Union Pacific Railroad Company annually in advance. In addition to the foregoing rental the lessee agrees to pay to the lessor, for the right and license granted to the lessee in Section 2 hereof, rental at the rate of \$5.00 per annum, payable to the Union Pacific Railroad Company annually in advance. Acceptance of said rentals in advance by the lessor shall not act as a waiver of its right to terminate this lease and agreement as [393] hereinafter provided.

\* \* \* \* \*

“(3) Union Pacific Railroad Company included as a party:

“The Union Pacific Railroad Company, lessee of the railroad and other property of the Oregon Short Line [394] Railroad Company, is hereby included as a party to said agreement and it is understood that wherever the word lessor appears in said agreement, it shall be taken to mean the Oregon Short Line Railroad Company and the Union Pacific Railroad Company collectively.

“(4) Effective date,—term:

“This supplemental agreement shall be effective as of the 1st day of May, 1942, shall be attached to and become a part of the aforesaid agreement of July 19, 1932, and the same shall remain in full force and effect in accordance with the terms thereof, subject to termination as therein provided.

“In witness whereof the parties here to have caused this agreement to be executed in duplicate as of the day and year first herein written. Oregon Short Line Railroad Company, Union Pacific Railroad Company, by E. F. Ashby, Vice President. Witness: P. A. Schmitz. Pacific Fruit Express Company, by K. V. Plummer, its Vice President and General Manager. Witness: C. O. Hisely. Attest: Roy G. Hillebrand, Assistant Secretary. Approved: H. T. Whyte, Assistant General Manager. Approved: E. G. Conners, Vice President, Operations. Approved: B. W. Hanson, Traffic Manager. Approved as to form: George H. Smith, General Solicitor. Approved as to execution: E. M. Sawyer, Land and Tax Agent, F. J. Melia, Contract Attorney. [395] Approved: R. E. Titus, General Manager. Approved: W. H. Hulsizer, Manager of Properties.” There is a stamp here that is not quite legible except in part and that part is: “Approved: H. T. Whyte, Assistant General Manager by F. E. Dahlin.”

Attached to that is a blueprint, showing the enlarged transformer site from 15 by 22 feet to 32 by 31 feet, also the extension of the lines to the PFE plant.

Mr. Davis: If the Court please, we would ask if we cannot have and request that we be furnished the lease agreement between the Union Pacific Railroad Company and the Southern Pacific Railroad Company and the Pacific Fruit Express as referred to in Section 11 of Exhibit No. 28 which was read to the jury by counsel.

Mr. Anderson: We do not have it, Mr. Davis.

The Court: They say they don't have it.

Mr. Davis: May we ask Mr. Judge another question on cross examination.

The Court: Yes, you may.

#### Recross Examination

Q. (By Mr. Davis): Mr. Judge, on the morning or during the forenoon of November 4, 1950, did Mr. H. O. Johnson introduce you to Mr. Guy McClellan as an electrician?     A. No, sir. [396]

Q. You were not introduced to Guy McClellan as an electrician?     A. No, sir.

Mr. Davis: That's all.

Mr. Anderson: No questions.

#### AUBURN C. TAYLOR

called as a witness by the defendant, after being first duly sworn, testifies as follows:

#### Direct Examination

Q. (By Mr. Anderson): Your name is Auburn C. Taylor?     A. Yes, sir.

Q. Where do you reside, Mr. Taylor?

A. At 1115 Northeast 114th Avenue, Portland, Oregon.

Q. And what is your occupation?

A. Electrical supervisor for the Union Pacific Railroad Company.

Q. How long have you been employed by the Union Pacific?     A. Approximately 12 years.

Q. Has that all been engaged in electrical work?

A. Yes, sir.

Q. Were you located at Pocatello at one time?

(Testimony of Auburn C. Taylor.)

A. Yes, sir.

Q. In what capacity?

A. As an electrician,—lead electrician and electrical foreman.

Q. Over what period of time were you here in Pocatello? [397]

A. I came to Pocatello in 1942 and I worked around Pocatello, in and out, on electrical work until November 1, 1952.

Q. What was your occupation here, or your title on November 4, 1950?

A. Lead electrician.

Q. What does that mean, lead electrician?

A. On this job I was in charge of the electrical work in Pocatello. There were 11 electricians and I was in charge of the electricians and the work.

Q. Was that for the Union Pacific Railroad Company?

A. Yes, sir, for the Union Pacific Company.

Q. Did you or any of these men work for the Pacific Fruit Express Company, that is, were you on their payroll?

A. No, sir.

Q. Mr. Taylor, I take it that you are familiar with the Pacific Fruit Express Company sub-station and the connection to it?

A. Yes, sir.

Q. Is there a line, extending from the sub-station, over across the track to the so-called Batiste line?

A. Yes.

Q. Is there a connection on the pole on the Batiste line, where it takes off and comes to the sub-station?

A. Yes, sir.

(Testimony of Auburn C. Taylor.)

Q. What kind of a connection is that?

A. It is commonly referred to as a junction pole and the [398] connection is made through some disconnect switches to their line.

Q. Can you state whether that is the point where the electrical energy is delivered to the Pacific Fruit Express Company?

A. To my knowledge, yes, that is the point.

Q. Has there been an occasion or occasions when you were called to do work for the Pacific Fruit Express Company as an electrician?

A. Yes, sir.

Q. Do you recall whether there was any of that work to be done in 1949 or 1950. Were you ever called for those two years?

A. As near as I can recall it was in 1949.

Q. And did you, in 1948, do some work?

A. Yes.

Q. I show you Defendant's Exhibit No. 33, is that the work which you and your gang did for the Pacific Fruit Express Company?

A. Yes.

Q. How did you happen to do that work, was it at someone's request?

A. Yes, it was at someone's request.

Q. Do you know whose it was, was it the Pacific Fruit Express or the Railroad Company?

A. This work wasn't done at that location—

Q. Yes, I understand that. [399]

A. A dock had been built by the Pacific Fruit Express Company and they requested service for

(Testimony of Auburn C. Taylor.)

this dock which contained an ice crusher and conveyor. Our power lines were,—we had a power supply near that and they wanted service for this facility and when service was requested we performed the work.

Q. Did you or any of your employees working under you, did you ever have a key or keys to the Pacific Fruit Express Company sub-station?

A. No, sir.

Q. Do you know who did have the key?

A. The plant superintendent at the Pacific Fruit Express Company.

Q. If there were any repairs to be made at the Pacific Fruit Express Company or if they wanted any service performed by the Railroad, did they ordinarily contact you?

A. You mean directly?

Q. Well, did you have any work to perform for them in 1949 or '50?

A. Yes, and they would ordinarily make contact with me.

Q. Did you work on November 4, 1950?

A. No.

Q. Do you know what day of the week it was?

A. That was on Saturday.

Q. Are your craft or the men that worked for you and yourself [400] on a five-day week and is that the reason that you didn't work Saturday?

A. Yes, sir.

Q. When did you first learn of Mr. Johnson's injury?

A. Sunday morning, as I recall.

(Testimony of Auburn C. Taylor.)

Q. It was on the following day?

A. Yes, on the following day.

Q. Did anyone from the Pacific Fruit Express Company call you at all on Saturday, November 4, 1950?

A. No, sir.

Q. Do you know whether any of your employees were called to go over around the PFE plant that day?

A. None were called.

Q. Would you know that, and if so, how?

A. A time-card is made for all of the time worked and it was necessary that I check and approve all of the time-cards.

Q. Did you approve any for that day?

A. I approved two cards for that day.

Q. And what were they?

A. Two men worked at re-lamping the flood lights in the retarder yard on Saturday evening.

Q. That was on November 4, 1950?

A. Yes, sir, on November 4.

Q. Where is the retarder yard with reference to the Pacific Fruit Express Company ice plant?

A. It is south. The Pacific Fruit Express Company would be on the north end of the yard and the retarder yard on the south end.

Q. About what is the distance between them?

A. I would say a mile and a half.

Q. I think that you said that you were acquainted with the sub-station and the equipment in there?

A. Yes, sir.

Q. Do you know anything in that sub-station that was defective?

A. No.

(Testimony of Auburn C. Taylor.)

Q. That would be prior to November 4, 1950, or on November 4, 1950? A. No, I don't.

Q. Can you state what the fact is as to whether or not that sub-station was operating effectively so far as delivering electrical energy to it and supplying the Pacific Fruit Express Company?

A. I would say that it was operating properly.

Q. I presume that you have heard the testimony,—have you been in court during the trial?

A. No, I have not been in court until today.

Q. Let me ask you this, are there switches in that sub-station which will de-energize all of the power in the sub-station, if operated?

A. As one set of switches or two? [402]

Q. I said switches?

A. Yes, there are switches that will.

Q. One switch does what?

A. One set of switches will disconnect the transformer and they operate together, and the other set are three individual switches and they operate to disconnect the lightning arresters.

Q. And if all four of those are pulled or disconnected, is there any power left alive in this station? A. None within reach.

Q. Is this transmission line across the tracks to the sub-station, is that used for any purpose by the Railroad Company? A. No.

Q. Mr. Taylor, are you a graduate of some electrical school,—do you have a degree or something to qualify you as an electrician?

A. I have served an apprenticeship and I have

(Testimony of Auburn C. Taylor.)

three years of engineering, I do not have a degree.

Q. In connection with your studies and your experience, are you able to say that when this sub-station was constructed in 1925, was it a standard sub-station?     A. Yes, sir, it was.

Q. During the time that you were here in Pocatello, working as an electrician or a lead electrician, did you or any [403] of your men ever change the transformer oil in the transformers for the Pacific Fruit Express Company?

A. No, sir.

Q. What is the fact as to whether or not you had any duties to perform over about the Pacific Fruit Express Company property, on the sub-station in question without a request from someone in the Pacific Fruit Express Company?

A. I didn't have any to perform, no.

Q. You work for the Union Pacific?

A. Yes, sir.

Q. And you are not on the payroll for the Pacific Fruit Express Company?     A. No.

Mr. Anderson: I think that is all, you may cross examine.

#### Cross Examination

Q. (By Mr. Davis): How old are you, Mr. Taylor?     A. 35.

Q. Now, insofar as you are concerned, in connection with your duties to your employer, the Union Pacific, and any work done for the PFE, you were operating under a written contract that they had, were you not?

(Testimony of Auburn C. Taylor.)

A. I didn't have any contract to work. I was only working [404] under instructions to work for them and we would be compensated.

Q. And who gave you instructions to work for the PFE and that you would be compensated?

A. When I went to work the fellow over me was C. M. Seainer and he issued those instructions to me and they were never changed by anyone over me after that time.

Q. And your instructions, at all times were, if the PFE wanted any electrical work or inspection done, if they requested it of you, you and your force should do it?

A. I don't believe that the instructions were quite that way.

Q. How were they?

A. The instructions were that so far as the PFE Company lines involved our lines and the work involved where trouble on their lines or property would jeopardize our line, we would at their request perform the work for them.

Q. If I understand it, you were only to do the work for the PFE if it would protect railroad property?      A. No, sir.

Q. Did the superintendent or anyone at the PFE plant get men from your crew at the time that you were working here, to come out if they wanted them?

A. I myself was in contact with the division engineer's office at Pocatello,—later we had a telephone of our own. If [405] they were unable to

(Testimony of Auburn C. Taylor.)

contact us by telephone they generally contacted us through the division engineer's office.

Q. The PFE tried first to contact your department by telephone if they wanted work done?

A. I don't know what the procedure was that they used.

Q. You don't know and you were in charge as lead man?     A. Not for the PFE.

Q. No, you were in charge for the Union Pacific as lead man for how many years, Mr. Taylor?

A. For ten years.

Q. And you don't know what arrangement there was or how the PFE tried to get in touch with your office if they wanted or needed an electrician?

A. I answered that a moment ago. We had a telephone and if they were able to reach us contact was made that way, that is how they contacted us and if not, we were in contact with the division engineer's office here in Pocatello. The road gang works over the whole division and we have to contact and tie up so that they will know where to contact us.

Q. What other electrical department did the Union Pacific have beside the road crew?

A. They have a shop crew.

Q. Was the shop crew under you?

A. No, sir. [406]

Q. They have a shop crew of electricians?

A. Yes, sir.

Q. Do you know how many electricians they employed there during your time here?

(Testimony of Auburn C. Taylor.)

A. No, sir, I cannot give a figure on that.

Q. In your road crew there were 11 electricians?

A. Yes, sir.

Q. Now, the Union Pacific had, here in Pocatello, during your time a regular electrical distribution system, didn't they?

A. Would you repeat that question?

Mr. Davis: Will you read it, Mr. Vaughan?

(Question read by reporter.)

A. As a system you mean that we distributed power among our facilities?

Q. Yes.            A. Yes.

Q. You had your own transmission lines?

A. Technically they were distribution lines.

Q. You had a distribution line?            A. Yes.

Q. Well, you transmitted this 12,500 volts of electricity over that line, didn't you?

A. Yes.

Q. You had how many sub-stations under your supervision?

A. I think we have possibly seven. [407]

Q. You think you have approximately seven sub-stations?            A. Yes.

Q. You are thoroughly familiar with the construction and conditions that existed at the Pacific Fruit Express sub-station which you refer to on November 4, 1950, were you not?

A. So far as the construction is concerned, I was familiar with it.

Q. And you became familiar with it by seeing it and observing it and going in to it, didn't you?

(Testimony of Auburn C. Taylor.)

A. That is right.

Q. You have been in there, haven't you?

A. Yes.

Q. And your men have been in it?

A. Some of them have, yes.

Q. Now, you know that the meter reader,—he was an electrician, was he not, Mr. Eskilson?

A. Yes, electrical foreman.

Q. Electrical foreman at the shops?

A. Yes.

Q. You stated, I believe, that you had no duties whatever,—that is, your department had no duties with reference to the sub-station?

A. That is right, with reference to this sub-station.

Q. Yes, that is the one I am talking about?

A. Yes, sir, that is right.

Q. You know that you had a duty under agreement between the Oregon Short Line Railroad Company and the agreement with the Union Pacific Railroad Company and the company, to read the meters every month?

A. I had nothing to do with that.

Q. But the Union Pacific had that duty under the agreement?     A. I cannot say.

Q. That is out of your jurisdiction?

A. Yes, sir.

Q. Do you know or don't you know that your employer had an agreement to inspect the meters at this sub-station?     A. I didn't know it.

Q. And you don't know it now?

(Testimony of Auburn C. Taylor.)

A. No, sir.

Q. Now, you knew at the time you worked and you know now that the PFE didn't have any regular or competent electricians out at their plant, didn't you?

Mr. Anderson: We object to that as being immaterial.

The Court: It may be immaterial but I think all of the officers and the supervisors who testified said that they didn't have any and I think it is recognized that they did not. \* \* \* \* \* [409]

Q. What is your position now, Mr. Taylor?

A. I am with the Union Pacific Railroad Company, I am electrical supervisor of the Northwest District from Huntington, Oregon, west.

Q. And who had the position that you have now, when you were stationed at Pocatello?

A. D. G. Williams, he is now the Union Pacific electrical [410] engineer.

Q. From Huntington on northwest, you are the supervisor of all of the electrical equipment?

A. Not all.

Q. Do you know Mr. Hugstead? A. Yes.

Q. What position did he have in Pocatello when you were here?

A. The same as he has now.

Q. And what is that?

A. He is the electrical supervisor over this district.

Q. And he lives in Salt Lake City, Utah?

A. Yes.

(Testimony of Auburn C. Taylor.)

Mr. Davis: I am sure as I recall if I heard, the witness testified that Mr. Hugstead held the same position that he did when he was in Pocatello.

Q. You were familiar, were you not, in a general way with the generators and electrical equipment that was in the PFE plant at Pocatello?

A. No.

Q. You know that those generators and the electrical equipment required the care and attention of electricians, do you not?      A. Yes.

Q. Can you say whether or not any of your men were in there or were ever familiar with it? [411]

Mr. Anderson: I object to that as immaterial and having nothing to do with the issues of this case.

The Court: He may answer.

A. I don't know.

Q. Do you know that none of them were ever in there during the time that you worked here at Pocatello?

Mr. Casterlin: We object to that, he has already answered the question, he says that he doesn't know.

The Court: He may answer again, as to whether he knows or not.

A. I don't know whether anyone is familiar with it or not,—not to my knowledge.

Q. Do you know as an electrician, and I am asking you now as an expert. As an expert you know that it would be natural and necessary for a plant the size of the Pacific Fruit Express Company

(Testimony of Auburn C. Taylor.)

plant here with the electrical equipment that it was using and the amount of energy that they purchased from the Union Pacific every month, to have someone that they could get in touch with immediately concerning the electrical equipment and the supply of energy, don't you?

A. Yes. \* \* \* \* \* [412]

Q. Now, Mr. Taylor, you don't mean to say that with the number of sub-stations that you had, seven, you say, and with the distribution lines, that electricians were not available for the caring of anything in connection with those sub-stations and equipment and lines, on Saturdays and Sundays?

A. Electricians were available for our work.

Q. Were electricians available on Saturdays and Sundays for the Pacific Fruit Express Company if they needed them, if they had any trouble out there or if there were breakdowns?

A. I don't know about the Pacific Fruit Express.

Q. I am asking you, if the electricians from your department, Mr. Taylor, were available for the Pacific Fruit Express Company if they called concerning anything of electrical trouble or about electrical trouble during Saturdays and Sundays?

A. If the men were available and they could get the proper authority for authorizing over-time, and an okay for our men to work we could probably find the men to work. [413]

Q. Now, do you know of any man or men in your crew at any time during the time that you

(Testimony of Auburn C. Taylor.)

were here, ever going to the Pacific Fruit Express Company in the night-time on a call for that company?     A. I don't recall any.

Q. By that you mean that you don't know whether they did or whether they did not?

A. If they had, during my time I would have known. There were no calls.

Q. You are now able to say that never, during the time that you worked here was there ever anyone or was it necessary to have anyone,—any electrician from your department who went to the Pacific Fruit Express Company during the night-time?

A. If I may make an explanation on that. The PFE Company took power from our line. There have been a number of times when we have had outage due to lightning or other trouble, which has given us trouble on our line and we worked,—our line goes right by theirs. I don't recall any trouble on anything at the PFE plant but we have worked our lines at night.

Q. And have you gone to this particular sub-station, you or any of your men at night?

A. No.

Q. You never did? [414]     A. No.

Q. When you have trouble on the rest of the power line, it would not affect the power that went into the sub-station, the 12,500 volts that was ahead of the switch?     A. Yes.

Q. And then when you had trouble it did affect this sub-station, didn't it?     A. Yes.

(Testimony of Auburn C. Taylor.)

Q. And you were notified of that, at night, by the PFE, were you not?

A. When our power line was out, we might get notified, yes, we might get notified from a half-dozen sources and I would say yes, that the PFE called as well as others.

Q. Now, Mr. Taylor, isn't it a fact that if the PFE needed electricians and called your department either day or night, somebody would be furnished to them?

Mr. Casterlin: I object to that, it is repetition, I think it has already been answered.

The Court: No, I don't think so. Can't you answer that straight up? A. Yes.

Mr. Davis: That is all. [415]

### Redirect Examination

Q. (By Mr. Anderson): That would depend, of course, on whether you might have anyone available to perform any work? A. Yes, sir.

Q. Now, with reference to the shop electricians, do you know their scope of operation?

A. They do not perform any line work.

Q. No line work? A. No line work.

Q. The testimony that you have given here, and what we have been talking about is line work?

A. Yes, sir.

Q. Mr. Taylor, have you ever been called upon by the Pacific Fruit Express Company to make inspections? A. No, sir.

Q. The question was asked by Mr. Davis about

(Testimony of Auburn C. Taylor.)

the power going out and you described that as some failure, maybe, on your own line?      A. Yes.

Q. If there was a failure on your line, or the Batiste line, would that affect the power to the Pacific Fruit Express Company?      A. Yes.

Q. And then you did what was necessary on your line and that [416] took care of the situation at the PFE?      A. Yes, sir.

Q. On the distribution of power, do you distribute power to anyone, that is, your own departments, for instance, to anyone other than the Pacific Fruit Express here?      A. No, sir.

Mr. Anderson: That's all.

#### Recross Examination

Q. (By Mr. Davis): All of the power that is distributed by your line is distributed to the Pacific Fruit Express?

Mr. Casterlin: Oh, no, he didn't say that.

The Court: Yes, that is the way I understood him, you better clarify that. Will you read the question and answer, Mr. Reporter?

(Question and answer read by reporter.)

The Court: Do you understand the question and answer now?      A. Yes, sir.

Mr. Anderson: I did not understand it that way.

The Court: If you want to clarify it you better do it.

Q. (By Mr. Anderson): You didn't distribute any power except to [417] the PFE and the railroad?

(Testimony of Auburn C. Taylor.)

A. That is what I assumed, the question, the railroad and the PFE.

Mr. Anderson: That's all.

Recross Examination

Q. (By Mr. Davis): These seven sub-stations that the railroad has, you deliver energy through them? A. Yes.

Mr. Davis: That is all.

Mr. Anderson: That is all.

The Court: We will adjourn at this time until 10:00 o'clock tomorrow morning.

November 25, 1953, 10:00 o'clock a.m.

Mr. Davis: With reference to the instrument that we asked to see and which was referred to in the exhibit, we assumed that our motion to produce, naturally, covered that as well as the things that were given to us by counsel. Now counsel has said to the Court that they don't have it which, I know, is correct, if counsel said so. We would like to know, however, where it is, whether it is in Pocatello or not and if [418] this case is not completed I am sure if the defendant needed it, it could be here Friday morning and we would like to have it.

The Court: I will not stop you from trying to get it here but I think maybe we are going to finish this case, I am going to have a conference sometime this morning with the jury and I will know whether we are going to finish today or not.

Mr. Davis: Well, of course, if it is completed and the instrument is not here then, of course, we will have to forego that.

The Court: You may call your next witness, Mr. Anderson.

HUBERT BRANAM

being recalled by the defendant, having heretofore been duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Anderson): Mr. Branam, do you know, out at the PFE plant if you have any generators?

A. Only about 15 horsepower which is called an exciter,—we buy our current, our equipment which we have are motors.

Q. Have you had any occasion that you know of, to have any outside concern or the Railroad Company take care of [419] repairs that might be needed on the motors or the exciters?

A. No, I don't believe so, we have our own repairmen there and while they are not classified as electricians, they are trained to take care of that kind of equipment.

Q. Will you state whether or not it is necessary, where you do require any work, that you call the Union Pacific electricians?

A. We are not bound by rules,—one time I had the Idaho Power Company do some line work for me.

Q. And do you know that sometime in 1950,—state what the fact is as to whether or not sometime in 1950 there was some work done at the PFE that was contracted to an outside electrical firm?

A. When the car shops were built, that was

(Testimony of Hubert Branam.)

under contract to put in the pole line through the car shop yards, transformers, station lights, and motor control equipment.

Q. Did the Union Pacific Railroad Company do that work?           A. They did not.

Q. Do you know who did?

A. I know who the sub-contractor was for the main contractor.

Q. Who was it?

A. The Strand Electric Company.

Q. I believe that you testified yesterday that you started to work for the Pacific Fruit Express Company in 1921, is that correct? [420]

A. That is correct.

Q. Where are the headquarters of the Pacific Fruit Express Company?

A. At San Francisco.

Q. And do you know where the headquarters of the Union Pacific Railroad Company are?

A. Yes, sir.

Q. Where?           A. At Omaha.

Q. Can you tell us briefly just what business the Pacific Fruit Express Company is engaged in?

A. Yes, sir, car line operator.

Q. And what services, if any, does the Pacific Fruit Express Company perform for the railroads?

A. They furnish cars and protective service for perishable commodities.

Q. You mean refrigerator cars?

A. That is right, refrigerator cars, and we ice

(Testimony of Hubert Branam.)

them or furnish heater service, whichever is required.

Q. Are those cars which you refer to, are they Pacific Fruit Express cars?      A. Yes, sir.

Q. Do you know whether or not the railroad company has any refrigerator cars?

A. I understand that they do not. [421]

Q. Can you tell us whether or not the Pacific Fruit Express Company performs similar services for other railroads other than the Union Pacific?

A. Yes, sir. \* \* \* \* \*

Q. What other railroads?

A. The Southern Pacific, the Western Pacific, and we furnish cars and ice for the Railway Express Company.

Q. What states does the Pacific Fruit Express company operate in, can you tell us?

A. I could tell you some of them, I may not be able to name them all without making a list,—there's Washington, Oregon, Idaho, Utah, Wyoming, Nebraska, Missouri, Kansas, [422] Texas, Arizona and California, there may be others that I have missed, I don't remember whether that covers all of them or not.

Q. Is that in the performance of the same service that you testified is given to the Union Pacific?

A. Yes, sir.

Q. Here at Pocatello, what departments does the Pacific Fruit Express have?

A. The ice plant which is known as the refrigeration department, the car department, repairing

(Testimony of Hubert Branam.)

cars and the store department which furnishes materials.

Q. Does each department have a head man or manager? A. Yes, sir.

Q. And they are Pacific Fruit Express men?

A. Yes, sir.

Q. Do you know where those officers,—who they report to or who they work under?

A. Yes, sir.

Q. State whether or not they are Pacific Fruit Express officers?

A. Yes, they are Pacific Fruit Express officers at San Francisco.

Q. Do any of these departments make reports to the railroad company?

A. The ice plant does not, I don't think that the others do, that is, to the best of my knowledge.

Q. Does the railroad officers, let us say here in Pocatello, undertake to dictate or supervise or control any of the work out here at either of the departments that you have mentioned?

A. No, sir.

Q. Now finally, Mr. Branam, can you tell me whether or not the business of the Pacific Fruit Express Company here is conducted through Pacific Fruit Express Company's own officers and agents?

A. Yes, sir, that is the only ones I take any orders from.

Mr. Anderson: That is all.

(Testimony of Hubert Branam.)

Cross Examination

Q. (By Mr. Davis): Mr. Branam, you talked about the generators and electrical equipment,—after you take the electricity from the Union Pacific, in addition to the transformers in the sub-station you have a number of transformers inside the yard or the ice plant?

A. Yes, adjacent to the ice plant, not inside.

Q. But they are inside of the other enclosure, where the ice plant is?     A. Yes, sir.

Q. And they are separate from the sub-station?

A. Yes, sir. [424]

Q. And you do not take any electricity or energy or voltage from this sub-station that is shown on Exhibit No. 20 until it is reduced to 2300 volts, do you?     A. That is correct.

Q. You are an officer,—you do have an official position with the Pacific Fruit Express?

A. Yes, in the operating department.

Q. Now, you testified about the railroads,—you know, don't you that the Pacific Fruit Express is an operating company called a car company and that it is owned and controlled by the Union Pacific Railroad Company and the Southern Pacific Railroad Company, do you not?

A. I understand that they own it jointly.

Q. And you know that the number, the telephone number of the Pacific Fruit Express is 268 on the exchange, don't you?

A. That is correct.

Mr. Davis: That is all.

Mr. Anderson: That's all. The defendant rests, your Honor. \* \* \* \* \* [425]

Mr. Davis: We rest, your Honor.

The Court: The jury may retire.

(In the absence of the jury.)

The Court: Mr. Anderson, you have a motion, I believe.

Mr. Anderson: Yes. May it please the Court, the defendant, at the close of all of the evidence, both sides having rested, moves the Court to instruct the jury to return a verdict in favor of the defendant and against the plaintiff, for the following reasons:

That the evidence is wholly insufficient to establish any negligence on the part of the defendant. The evidence shows, without dispute or at least it is wholly insufficient to show that the Railroad Company defendant either owned, operated or controlled the sub-station or the line leading to it from across the tracks. These were all under the exclusive jurisdiction and control of the Pacific Fruit Express Company. The plaintiff LaVerl Johnson was a Pacific Fruit Express Company employee and was ordered to go into the sub-station by his superior officer, also of the Pacific Fruit Express Company, without any knowledge on the part of the defendant. The evidence shows that the sub-station performed its function as a sub-station and that there was nothing defective about it [429] and that the injuries to the plaintiff LaVerl Johnson was caused wholly and entirely by the method or the manner in which the sub-station was operated by

the officers or the employees of the Pacific Fruit Express Company; that LaVerl Johnson was let into the sub-station by the PFE officer who apparently told him that the power was off, when as a matter of fact, it had only been turned off to the transformers and the switches to turn off the power to the lightning arresters had not been disengaged. If that had been done or if H. O. Johnson had properly supervised the work of LaVerl A. Johnson, the accident would not have occurred. All that the defendant did was to furnish electrical energy to the sub-station over a line owned by the Pacific Fruit Express Company, which is wholly insufficient to establish any negligence on the part of the defendant for the injuries to Mr. Johnson. That the acts of Mr. Howard O. Johnson of the Pacific Fruit Express Company, and the manner and method in which the sub-station was operated, constituted the intervening and efficient cause of this accident. Even assuming that there might be negligence on the part of the Railroad Company, which we certainly do not admit, because the evidence does not establish that we either owned, controlled or operated the sub-station or had anything to do with it, it was on premises leased to the Pacific Fruit Express Company which [430] had exclusive control of the premises and we had no right there except by their invitation. The Pacific Fruit Express Company and the Union Pacific Railroad Company are separate and distinct corporations, each functioning in its own proper way and the defendant is not liable for any acts on the

part of the Pacific Fruit Express Company, its agents, servants or employees. Further that on the day of the accident no one of the Railroad Company, and the evidence is clear, had any evidence or knowledge that Mr. Johnson was going into the sub-station, neither did the Railroad Company have knowledge that the sub-station would be open to anyone or to Mr. LaVerl Johnson, and the Railroad Company had no keys,—they were entirely in the possession of the Pacific Fruit Express Company officers and no one on the Railroad knew of the accident or what had happened until sometime after the accident, probably the next day, I think the evidence shows.

The Court: In view of the rule which permits the Court to consider this question again if necessary, the motion will be denied at this time. I will ask counsel to come into my chambers. Mr. Bailiff, will you call the jury.

(In the presence of the jury.)

The Court: Ladies and gentlemen of the [431] jury, we are going to recess at this time until 12:45 and I will ask you to meet me at that time, you will remember the hour, 12:45.

November 25, 1953, 12:45 p.m.

The Court: Mr. Reporter, the record may show that counsel were advised by the Court as to the instructions, now, gentlemen, you may proceed with your argument.

(Arguments of counsel.)

## INSTRUCTIONS OF THE COURT

Ladies and Gentlemen of the Jury:

It becomes my duty as Judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the instructions which I will state to you.

You shall consider the instructions as a whole and not pick out any particular instruction and place undue [432] emphasis on such instruction.

You will also disregard any statement made by counsel on either side which is not sustained by the evidence, and any evidence which may have been offered on either side and not admitted by the Court, and any evidence which after its admission was stricken by the Court. You will remember that certain evidence was stricken by the Court. I must call your attention to the fact that one of the attorneys commented on the testimony of one witness that was stricken by the Court. This comment should not have been made because it called your attention to the fact that this witness testified to certain matters, and that, having been stricken by the Court and counsel having asked me to instruct you to disregard it, this statement should not have been called to your attention again.

The statements of the attorneys in this case, made

at the trial and in their arguments are not evidence and should not be considered by you as such.

Your verdict must be based upon the evidence. In arriving at it you should not discuss or consider anything in connection with this case except the evidence received in the trial.

It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the [433] parties to this action as the interests of strangers, to decide the issues upon the merits, and to arrive at your conclusion without regard to what effect, if any, your verdict may have upon the future welfare of the parties.

This is an action brought by the plaintiffs, LaVerl and Joleen Johnson, husband and wife, against the defendant, Union Pacific Railroad Company, wherein the plaintiffs seek to recover damages by reason of certain allegations of their complaint.

The pleadings here are made up of the complaint of the plaintiffs and the Answer of the defendant. These pleadings, or the allegations and denials contained therein, are not to be considered in any manner as evidence, as they are simply a statement of what each party claims, and if I may have your attention for a short time I will tell you very briefly what the parties claim here by their pleadings.

Plaintiffs are residents of the state of Idaho and the defendant is a corporation duly authorized to do business in the state of Idaho. Plaintiffs allege that on or about November 4, 1950, at 2:30 o'clock in the afternoon, plaintiff LaVerl Johnson received

injuries by reason of the negligence, carelessness and disregard of his rights by the defendant in the furnishing of electrical energy and in the operation of an electrical sub-station [434] located in the city of Pocatello, Bannock County, Idaho. That by reason of this the plaintiff LaVerl Johnson was so burned, and maimed by electrical energy as to require the amputation of both of his legs at the knee and his right arm at the shoulder socket. That the said plaintiff was otherwise injured by reason of the extreme shock to his entire nervous system resulting from electrical energy and the amputations. That said plaintiff at the date of the accident was an able bodied man of twenty-three years, earning approximately \$300.00 per month; that by reason of the actions of the defendant, plaintiff has suffered permanent and lasting injuries, and a total loss of income, all to plaintiffs' damage in the sum of \$300,000.

Defendant has filed its answer by which it admits that LaVerl Johnson was injured, but denies each and every allegation as to its negligence in any of the matters charged, or at all, and alleges that Plaintiff received his injuries in the course of his employment solely with the Pacific Fruit Express.

The defendant, Union Pacific Railroad Company, alleges as an affirmative defense that any injuries sustained by the plaintiff were caused in whole or in part, or were contributed to by the negligence or fault or want of care of the said plaintiff, LaVerl Johnson, and not by any negligence or fault or want of care on [435] the part of the defendant.

The defendant also affirmatively alleges that the work in which plaintiff was engaged at the time and place of the occurrence complained of in his complaint, had certain risks incident thereto which was obvious and well known to plaintiff, LaVerl Johnson, at all the times he was engaged in said work and also when he first entered thereon, and those risks were assumed by him and whatever injuries and illness he received in doing the said work, and which are complained of by the plaintiffs herein, arose from and were caused by those risks thus assumed by him.

I caution you again any statement that I have made here is not evidence but simply a recitation of what the parties claim.

The plaintiff and defendant come into Court as equals and you should treat them as such. The fact that one of the parties is a corporation and the other individuals should make no difference to you and you will in your deliberations not allow sympathy to sway you in the least. Sympathy has no place in the trial of a lawsuit, you will arrive at your verdict from the evidence submitted to you from the witness stand and the instructions given you by the Court. [436]

In passing upon the issues in this case, you will bear in mind that the burden is upon the one who asserts the existence of a fact to establish it, and in a civil suit such as this, to establish the fact by a preponderance of the evidence. By a preponderance of the evidence is not necessarily meant a greater number of witnesses, but a greater weight

of the evidence. That is the meaning of the word 'preponderance'—evidence which convinces you that the truth lies upon this side or that side; evidence which is more convincing and more persuasive. In this case the burden is upon the plaintiffs in the first instance to show by a preponderance of the evidence that the defendant was negligent as charged in the complaint, and that the alleged damages suffered by plaintiffs, LaVerl and Joleen Johnson, as a result of the injury to LaVerl Johnson, were by reason of and because of the alleged negligence of the defendant, Union Pacific Railroad.

"Negligence" is the failure to exercise reasonable and ordinary care, and by the term "reasonable and ordinary care" is meant that degree of care which an ordinarily careful and prudent person would evercise under the same or similar circumstances or conditions. Negligence consists in the doing of some act which a reasonably prudent [437] man would not do under the same or similar circumstances, or in the failure to do something which a reasonably prudent person would have done under the same or similar circumstances and conditions. Negligence is never presumed, but must be established by proof the same as any other fact in the case.

"Ordinary" or "reasonable" care are relative terms, and such care is proportionate to, and commensurate with, the danger involved. In other words, the greater the danger involved, the greater

is the care required, although there is but one standard of care, and that is reasonable or ordinary care, as defined in this instruction.

The defendant has asserted as an affirmative defense that the plaintiff, LaVerl Johnson, was negligent and that such negligence was the proximate cause of the accident. In other words, the defendant has charged that said plaintiff was guilty of contributory negligence. Regarding contributory negligence, I will say that it is called contributory negligence because it is charged to be the negligence of the person upon whose behalf or through whom the original claim is being made. The same definition applies to contributory negligence as applies to negligence, which I just defined to you. [438] In considering the matter of contributory negligence you should take into consideration the conditions as they existed at the time of the accident, the experience of the person charged with the contributory negligence, and his ability to reason and distinguish between acts that would be negligent and those which would not be negligent. If you find such negligence on the part of the plaintiff, LaVerl Johnson, and that such negligence was the proximate cause of the accident or directly contributed to the plaintiff, LaVerl Johnson's injuries, plaintiffs cannot recover even though you may find from the evidence that the defendant was also negligent.

The defendant can be held liable only for such negligence as constituted the proximate cause in whole or in part, of the injuries complained of.

In order for the plaintiffs to recover, it must be proved to your satisfaction, by a fair preponderance of the evidence, that defendant's negligence was the proximate cause in whole or in part of the injuries complained of.

The question always is: Was there an unbroken connection between the wrongful act, if any, and the injury? In no event can damages be allowed except such as resulted directly from the negligence of the defendant. [439]

The proximate cause of an injury is that which in a natural and continuous sequence, unbroken by any new independent cause, produces the injury, and without which the injury would not have occurred.

If you find from the evidence that the defendant was negligent as charged, then the burden is upon the negligent defendant to prove by a preponderance of the evidence that the contributory negligence of the plaintiff, LaVerl Johnson, was the proximate cause of the accident.

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.

The plaintiff has asserted as a further affirmative defense that the plaintiff, LaVerl Johnson, assumed

[440] the risks incident to his employment and that the defendant cannot be held liable for an accident occurring during the course of assuming those risks. Any employee does assume certain risks in connection with his employment, and in determining whether he assumes certain risks the question is not whether he actually observed and consciously assumed all of the risks involved, but whether the risks were such that they naturally grew out of the work in which he was engaged. If the risks were of such a nature that he could have understood and appreciated them, if he had used ordinary care, taking into consideration his age, intelligence and experience, then they were of such a character that he assumed them.

In considering the question of contributory negligence and assumption of risk on the part of the plaintiff. LaVerl Johnson, you are instructed that it is a generally accepted theory of the law that one's natural instinct is to preserve and protect himself from injury whenever possible and that it is unreasonable to suppose that a person would deliberately place himself in a position of danger if such danger were known or should have been known to him. In an action such as this, the presumption which arises in favor of the instincts of self-preservation and the known disposition of men to avoid [441] injury or personal harm to themselves constitutes a *prima facie* inference that the person injured was at the time in the exercise of ordinary care, and was himself free from contributory negligence, and the law presumes, unless the

contrary is shown, that such injured person exercised the measure of care which it was his duty to exercise. This presumption which arises in favor of self-preservation and the known disposition of men to avoid injury to themselves is rebuttable, and it is for you, the jury, to determine in this case whether or not that presumption has been overcome by the evidence.

In this case the defendant Union Pacific Railroad Company is a corporation and so is the Pacific Fruit Express Company a corporation, each are separate and function in their own proper ways, neither is liable for the acts of the other.

The general rule of law is that where one furnishing and supplying electricity for a valuable consideration, merely transmits its electrical current from its line to the consumer's wires, which it did not install, and does not control, it has no duty to inspect such wires and is not liable for injuries caused by defects in them. However, [442] where the company knows of any defects or by the exercise of ordinary care required of a company dealing in electricity, would know of such defects, its duty is to stop and not to send its deadly current to the defective appliances or equipment of the consumer or to and through defective electrical apparatus and it is liable for injuries to person or property caused by a breach of this duty.

Since electrical energy is one of the most destructive agencies, those engaged in its generation or distribution are held to the exercise of and are

required to exercise the highest degree of care and diligence to avoid injuries to persons who might lawfully but accidentally or otherwise come in contact with its wires carrying electricity. One engaged in the distribution of electrical current must exercise that degree of care which a reasonably prudent and careful man who is conscious of the dangerous and destructive character of the agency under his control and conscious also of the likelihood of injury under conditions and circumstances at a particular place, would at that place and under the same conditions and circumstances evercise to prevent injury. [443]

With respect to knowledge on the part of an agent which may be imputed to his principal, the law is that relevant knowledge may be acquired by an agent, either before the time of his employment or after he becomes agent. The important matter is not how the agent acquired the knowledge, but whether or not he had the knowledge when it became relevant in his work for the principal. If the agent has the information in mind at the time it becomes relevant in his work, the principal is bound equally where the knowledge was acquired privately by the agent as where he obtained it while acting as such agent. Therefore, where the agents of a company supplying an electric current had or should have had knowledge of a hazardous and dangerous condition of wiring and appliances maintained by a customer, and continue to furnish such current with such knowledge, if injury occurs by reason of such hazardous conditions the company

is liable for injuries occurring as the proximate result of furnishing such current.

You should not concern yourself with the negligence or lack of negligence on the part of the Pacific Fruit Express Company for that company is not a party to this action, unless you find that the negligence of the Pacific Fruit Express Company was the sole and only [444] negligence and that from the facts the Union Pacific Railroad Company was in no wise involved in proximately causing the injuries to the plaintiff LaVerl Johnson.

Every person or corporation, furnishing electrical energy for pay, shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees and the public, and as shall be in all respects adequate, efficient, just and reasonable.

It was the duty of the Union Pacific Railroad Company to comply with this rule.

There has been a great deal of testimony given in this case by opinion witnesses, or expert witnesses. An opinion witness, or expert witness, is one who has testified that he has sufficient knowledge concerning the subject matter through study, training, observation and experience, to permit him to give his opinion. Where the testimony of such witness is as to anything that can be observed and seen by any other witness, his testimony is to be viewed as that of any other witness, giving consideration to any particular training and experi-

ence [445] he may have as to any bearing it may have on any increased accuracy on his part over that of a person of ordinary experience. Insofar as his testimony is an expression of opinion based upon facts in the case shown by the evidence, you must, before considering the weight of the opinion of such witness, first find from the evidence that the facts upon which his opinion is based are true. The mere fact that the testimony was offered by an expert does not compel you to take that testimony in preference to any other. You are not bound by any opinion testimony, and it should be considered by you in connection with all the other evidence and should be given such weight as you believe it is entitled to receive.

If from a preponderance of the evidence, you believe that at the time of the alleged injury to LaVerl Johnson, the defendant, Union Pacific Railroad Company, was furnishing electricity to the Pacific Fruit Express Company for a valuable consideration and that the said Union Pacific Railroad Company was advised of or by the exercise of ordinary care the Union Pacific could have and should have known of the conditions that existed at the sub-station on the date of the accident, and you further find that such conditions were dangerous and [446] hazardous to life and property and that the Union Pacific Railroad Company continued to furnish high voltage electricity through said lines and into said sub-station and that as a proximate cause thereof LaVerl Johnson was injured, then the defendant was negligent.

It has been stipulated and agreed between the parties that from the experience of men, a man of LaVerl Johnson's age at the date of the injury would probably have a life expectancy of 40.17 years from that date, and the jury is entitled to take this into consideration on the question of the probable length of life of LaVerl Johnson and as tending to show ordinary experience in like cases.

You are instructed that in the event you should find from all of the evidence that the Defendant Union Pacific Railroad Company was negligent and that its negligence was the proximate cause of the injuries to LaVerl Johnson and you otherwise find from the evidence and from these instructions that the plaintiffs are entitled to recover, then in considering and fixing the amount of damages you may take into consideration as may be shown by the evidence the health of the plaintiff [447] LaVerl Johnson at the time he received the alleged injuries, his probable life expectancy, his earning capacity at the time, the effect of the injuries upon his future earning capacity, as well as the actual loss of earnings to the date of trial, together with the probable future medical expense that LaVerl Johnson may be required to expend by reason of the injuries and the effect of such injuries on said LaVerl Johnson's ability to enjoy a normal, healthy life and participate in the normal human affairs. You may also take into consideration the humiliation and disfigurement, if any, caused by such injuries. You may also in addition to the matters heretofore mentioned, consider the pain and suffer-

ing which LaVerl Johnson may have suffered as shown by the evidence, together with the pain and suffering, if any, which he may suffer in the future and during the remainder of his lifetime. In other words, you are entitled to fix damages based upon the loss and pain and suffering which LaVerl Johnson by reason of the alleged injuries may have suffered both present and future, and in so fixing such damages you should take into consideration all of the facts and circumstances as shown by the evidence, in such a manner as to do justice between the parties.

In no event should you find for the plaintiff in an amount greater than that prayed for in the complaint. [448]

You are instructed that the Union Pacific Railroad Company at the time of the alleged injuries to LaVerl Johnson was chargeable with knowledge of the effect upon a human being if contact was had between the wire or wires carrying voltage (of at least 12,000 volts) and a human being.

If, after deliberating on this matter, you determine that the plaintiff is entitled to recover, you should determine the amount by an open and frank discussion among your members and you should not arrive at any amount to be allowed, by each stating the amount you think should be allowed, then adding the several amounts together and dividing the total by twelve or by the number taking part in such method. This would be a quotient verdict and you should not, under your oath as jurors, arrive at any such verdict in such manner.

The fact that the Court has instructed you upon the rules governing the measure of damages is not to be taken by you as any indication on the part of the Court that it believes or does not believe that the plaintiff is entitled to recover damages. This instruction is given you solely to guide you in arriving at the amount [449] of your verdict only in the event that you find from the evidence and instructions given you by the Court that the plaintiff is entitled to recover. If, from the evidence and instructions, you find that the plaintiff should not recover, then you will disregard entirely the instructions that have been given you concerning the measure of damages.

In passing upon the questions of fact in this case, you will determine the credibility to be given the testimony of each witness and you have a right to take into consideration his interest, if any, in the result of the case, his demeanor on the witness stand, his candor or lack of candor, and all other facts and circumstances which would influence you in determining whether or not a witness has told the truth. You will determine the weight to be given to the testimony of each witness called to the stand.

If you believe from the evidence that any witness has wilfully sworn falsely in his testimony in this trial, regarding any material matter testified to by such witness, then you may totally disregard the testimony of such witness except insofar as he is corroborated, to [450] your satisfaction, by other

and credible evidence, or by facts and circumstances proved on the trial.

There has been some mention made in this case regarding Workmen's Compensation. You are instructed that Workmen's Compensation has nothing to do with the questions which concern you and that you are not to consider Workmen's Compensation with respect to this case and to your findings in any manner whatsoever.

You are instructed that in considering this case you must disregard any indemnity provisions contained in any of the contracts and leases between the defendant and the Pacific Fruit Express Company. This is a matter with which you are not concerned.

You have been told earlier in this trial but I think I should mention it again that you were not concerned with the Statute of Limitations as it pertains to the plaintiffs' right to bring this action. I think I should remind you again that this matter has been disposed of and you will not concern yourselves with that question, in your deliberations.

In this Court it is necessary that you all agree in arriving at a verdict. When you retire you will first elect one of your number as foreman and when you have agreed upon a verdict your foreman alone will sign the verdict. Forms of verdict have been prepared for your use and you will have no trouble in using the form which will correctly reflect your finding. You will see that one form contains a blank space for the amount of damages you allow, if any, if you find in favor of the plaintiff

against the defendant; another form will be given you on which there is no blank space in case you find for the defendant and against the plaintiff.

When you arrive at a verdict it will be returned into open court.

It will be necessary for me to take up a matter of law with counsel. You will be excused for a moment and I will call you back.

(In the absence of the jury.)

The Court: Does the plaintiff have any exceptions to record to the instructions?

Mr. Davis: Just the one instruction, where the Court instructed the jury that they should pay no attention to anything in reference to indemnity in this case. That, we agree is the law in so far as the [452] amount of any verdict is concerned but that question was asked to show the interest of the witness on the stand and the Court allowed the exhibits in for whatever they were worth and that amounts to striking those provisions out and we feel it should only be considered by them in so far as the examination of the witness was concerned to test the credibility as to whether the Company did or did not have a financial interest.

Mr. Casterlin: I call the attention to the fact that these were read without any limitation whatever, and went in without limitation.

The Court: You may record your objection.

Mr. Anderson: I have some here, but I am not sure that I have the right pages. May I see the instructions.

The Court: No, I never permit that. I have the instructions I did not give here.

Mr. Anderson: If the Court please, the defendant excepts to the instruction given with reference to where the defendant knew of defects and the general duty to stop power and cut off power where there was such a defect. My exception to that is that it might be good if applied to certain facts but it is not justified under the facts in this case because there were no defects in the sub-station.

Then, we except to the instruction which started out with knowledge on the part of an agent and then wound up with where there was a hazardous and dangerous condition and the railroad knew about it that it would be liable for furnishing power. Now we except to that because the facts are that there was nothing more hazardous or dangerous about this substation than would exist at any sub-station if it had been properly operated. In other words there is a difference between dangerous and defective condition.

The defendant excepts to another instruction with reference to furnishing electricity where it was advised or knew of the dangerous and hazardous condition for the same reason assigned to the last one.

Now, if the Court please, we would like to except to the failure of the Court to give defendant's requested Instruction Number 1 for the reasons set forth in our motion for directed verdict.

The defendant excepts to the failure to give that part of our requested Instruction Number 2 with

reference to the law that the mere fact of injury does not, and is not sufficient to establish liability.

The Court: Do you have in mind the instruction that I gave on that.

Mr. Anderson: I am not sure I caught that. [454]

The Court: I instructed the jury "In law we recognize what is termed as unavoidable or inevitable accident." These terms do not mean literally that it was not possible for such an accident to have been avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.

Mr. Anderson: I remember that but I didn't think it covered the mere fact of an injury. Now, I am not certain about this, but I think if I may I would like to take exception to the refusal of the Court to give our requested Instruction Number 6.

The Court: I will require you to give your reason, Mr. Anderson.

Mr. Anderson: Instruction Number 6 was to the effect that if you find from the evidence that after the sub-station was constructed, it was turned over and accepted by the P F E and was owned, operated and controlled and so on by the P F E, then by merely furnishing electricity the Railroad Company would not be liable or responsible under the facts here. That seems to me to be the law and

I think this instruction was not given, [455] nor was it otherwise given.

Now, as to Instruction Number 7, our requested Number 7, which has to do with the failure of the P F E employees to pull the switch or switches or warn LaVerl Johnson. We except to that for the reason that it is in accordance with the facts and it is according to the law in the cases we cite, especially the case in 10 Fed. 66.

The defendant excepts to the refusal to give our requested Number 8 which relates to the method of operation as having been the cause of the alleged injury and damage and if the jury did so find that it would be an independent and intervening cause, hence the proximate cause. This is also in accordance with the law as covered by the cases cited.

Defendant excepts to the refusal of the Court to give our requested Instruction Number 10 which relates to the outmoded and somewhat obsolete condition of the sub-station, and if the jury found that the method of operation was the cause of the injury then the plaintiff would not be entitled to recover here, and I can refer again to the case cited on our requested Number 8. We think it is the law and it is also according to the facts here.

I am not sure that I gave you in Chambers our Instruction Number 11——

The Court: No, you didn't, I have only [456] 7, 8 and 10.

Mr. Anderson: The defendant would also like

to take an exception to the refusal of the Court to give our special interrogatory.

(The following in the presence of the jury.)

The Court: Ladies and gentlemen of the jury, it is a little hard to give you as many instructions as I have in this matter without counsel feeling that I have not explained them as fully as I should. The Court is liable to make too positive a statement at times. I did instruct you to not pay any attention to the indemnity clause in the contract. I should have said, "as to whether that proved any issue in this case." I permitted this indemnity clause to be introduced in evidence only for the purpose of showing you the interest of the witness for the Pacific Fruit Express.

Now, there is no question in this case but what LaVerl Johnson was injured and I think it is plain that you know how he was injured. Now, as to the Pacific Fruit Express, none of their acts are to be charged against the Union Pacific. I have given you instructions as to the duty of the Union Pacific under the distribution of electricity in any place such as at this station which was hazardous or defective. I don't want you to be confused [457] at all in bringing this Pacific Fruit Express into this case as to their acts in pulling the switches or anything of that nature. I instructed you fully as to the liability of the Union Pacific in placing their power in this sub-station and you are not to tie acts of the Pacific Fruit Express in with those in any way.

I instructed you as to what action you should

take in case the conditions at the sub-station were dangerous or hazardous. This is a question for you, that is, whether the conditions were dangerous and hazardous and if you find that there was no hazardous or dangerous condition then you, of course, would pay no attention to the instruction along that line.

Now, you may retire again for a few minutes.

(The following in the absence of the jury.)

The Court: Does the plaintiff feel that I have covered the matter?

Mr. Davis: Yes, your Honor.

The Court: Do you have any further objection?

Mr. Anderson: I have no further objections.

The Court: You feel that I have fully covered the matter; if you don't, then I will call them back.

Mr. Anderson: I didn't feel or rather it didn't seem to me that it had been covered when your Honor told them they should not tie the Pacific Fruit Express into this.

The Court: I also told them that in any action such as their pulling the switches or anything of that nature that the Union Pacific should not be held responsible for any of their acts.

Mr. Anderson: I think it is all right.

The Court: You are satisfied.

Mr. Anderson: Yes.

The Court: Mr. Bailiff, you may recall the jury.

(The following in the presence of the jury.)

The Court: The alternate jurors may be excused at this time and I want to thank you for the atten-

tion you have paid here and for helping us out by standing by. The bailiffs will be sworn.

(Whereupon, the bailiffs were sworn by the clerk.)

The Court: The jury may now retire to consider their verdict.

[Endorsed]: Filed March 29, 1954.

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[Endorsed]: No. 14498. United States Court of Appeals for the Ninth Circuit. Union Pacific Railroad Company, a Corporation, Appellant, vs. LaVerl Johnson and Joleen Johnson, Husband and Wife, and Pacific Fruit Express Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed: September 2, 1954.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14498

UNION PACIFIC RAILROAD COMPANY, a  
Corporation, Appellant,  
vs.

LaVERL JOHNSON and JOLEEN JOHNSON,  
Husband and Wife, Appellees,  
PACIFIC FRUIT EXPRESS COMPANY, a Cor-  
poration, Appellee.

### STATEMENT OF POINTS

Comes now the Union Pacific Railroad Company and files its Statement of Points on which it will rely on the appeal in this matter.

#### I.

The court erred in refusing to direct a verdict in favor of the Union Pacific Railroad Company for the reasons stated in its Motion for Directed Verdict.

#### II.

The court erred in refusing to grant the Motion of the Union Pacific Railroad Company for Judgment Notwithstanding the Verdict for reasons set forth therein and for reasons set forth in its Motion for Directed Verdict.

#### III.

The court erred in permitting the plaintiffs' witness Elmer V. Smith to testify, over defendant's

objection, to the duty of one furnishing electricity, for the reasons stated in said objection.

#### IV.

The court erred in giving the second sentence of the instruction set forth in paragraph X of defendant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, for the reasons therein set forth.

#### V.

The court erred in giving the fourth and last sentence of the instruction set forth in paragraph XI of defendant's Motion for Judgment Notwithstanding the Verdict and For a New Trial, for the reasons therein set forth.

#### VI.

The court erred in giving the instruction set forth in paragraph XII of defendant's Motion for Judgment Notwithstanding the Verdict and For a New Trial, for the reasons therein set forth.

#### VII.

The court erred in refusing to give defendant's requested instruction No. 1, directing the jury to return a verdict in favor of the Union Pacific Railroad Company.

#### VIII.

The court erred in refusing to give defendant's requested instruction No. 6 set forth in paragraph XIII of its Motion for Judgment Notwithstanding the Verdict and For a New Trial, for the reason

that the instruction correctly stated the law and was not otherwise given.

### IX.

The court erred in refusing to give defendant's requested instruction No. 7 as set forth in paragraph XIV of its Motion for Judgment Notwithstanding the Verdict and For a New Trial, for the reason that the instruction correctly stated the law and was not otherwise given.

### X.

The court erred in refusing to give defendant's requested instruction No. 8 set forth in paragraph XV of its Motion for Judgment Notwithstanding the Verdict and For a New Trial, for the reason that the instruction correctly stated the law and was not otherwise given.

### XI.

The court erred in refusing to submit to the jury defendant's Special Interrogatory No. 1 as set forth in paragraph XVI of its Motion for Judgment Notwithstanding the Verdict and for a New Trial.

### XII.

The court erred in refusing to grant defendant's Motion for a New Trial for the reasons set forth herein, and for the following additional reasons:

(a) That the evidence is wholly insufficient to justify the verdict for the reasons set forth in paragraph II of defendant's Motion for New Trial.

(b) That the verdict is grossly and monstrously excessive.

(c) That the verdict is grossly and monstrously excessive and appears to have been given under the influence of passion, prejudice, caprice, or sympathy, and shocks the sense of justice and shows an utter disregard for the instructions of the court.

XIII.

That the verdict is against the law for the reasons set forth herein.

XIV.

That the evidence is wholly insufficient to support the judgment entered on the verdict for the reasons set forth herein, and for the reasons set forth in paragraph II of defendant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, and for other reasons therein set forth.

Dated, September 7, 1954.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. C. PHOENIX,

Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed September 8, 1954. Paul P. O'Brien, Clerk.